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No. 92-—

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents,

and

DON VAN VRANKEN on behalf of himself and all others similarly situated,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), applies to federal court decisions invalidating regulations of a federal agency.

2. Whether a court that announced a new rule of federal law and applied that new rule to the party challenging the old rule can deny *any* remedy to a similarly situated party because that party complied with the old rule.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

The parties to the proceeding below were: petitioner Atlantic Richfield Company ("ARCO"); respondents United States Department of Energy; Admiral James D. Watkins, Secretary, United States Department of Energy; George B. Breznay, Director, Office of Hearings and Appeals, United States Department of Energy; intervenor-respondents Don Van Vranken and Lew & Ted's Service, Inc.; and the intervenor-respondent certified class of wholesale purchaser-resellers of gasoline, butane, aviation fuels and propane from ARCO between May 1, 1976 and January 28, 1981.

The following companies are subsidiaries of petitioner ARCO (except wholly-owned subsidiaries):

ARCO Chemical Company
Lyondell Petrochemical Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT	ii
OPINIONS BELOW	1
JURISDICTION OF THIS COURT	2
STATEMENT OF THE CASE	2
A. The Federal Price Controls and the *Mobil* Litigation	3
B. The Proceedings Below	4
REASONS FOR GRANTING THE WRIT	7
I. TECA'S REFUSAL TO APPLY *BEAM* TO ITS DECISION INVALIDATING AN AGENCY RULE CREATES A CONFLICT WITH ANOTHER COURT OF APPEALS, AND WITH THIS COURT'S DECISION IN *BEAM*	9
A. The Decision Below Conflicts With Decisions of the Eighth Circuit and the Court of International Trade	9
B. The Court's Prompt Resolution of This Conflict Is Imperative	11
II. COURTS SHOULD NOT BE PERMITTED TO EVADE THE PROHIBITION OF SELECTIVE PROSPECTIVITY BY REFUSING TO AWARD ANY REMEDY TO A PARTY THAT COMPLIED WITH THE OLD RULE	14
A. The Decision Below Evades *Beam* by Refusing To Provide Any Remedy	15
B. The Basis On Which TECA Denied ARCO Any Relief Was Inappropriate Under *Beam* and Establishes a Principle That Would Nullify *Beam*	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES — Page

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 16
Barr v. McGraw-Hill, 770 F. Supp. 855 (S.D.N.Y. 1991) 11
Ceramica Regiomontana, S.A. v. United States, No. 88-05-00394, 1992 Ct. Intl. Trade LEXIS 68 (May 15, 1992), *amended on other grounds*, No. #92-76, 1992 Ct. Intl. Trade LEXIS 71 (Ct. Int'l Trade May 19, 1992) 11
District Lodge 64 v. NLRB, 949 F.2d 441 (D.C. Cir. 1991) 9
Harper v. Virginia Dep't of Taxation, 410 S.E.2d 629 (Va. 1991), *cert. granted*, 112 S. Ct. 1934 (1992) 9
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) ..... *passim*
Mobil Oil Corp. v. DOE, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) 2, 3, 4
Mobil Oil Corp. v. DOE, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) 2, 4, 5
Mobil Oil Corp. v. DOE, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982) 2, 4, 5
South Corp. & Seal Fleet, Inc. v. United States, 690 F.2d 1368 (Fed. Cir. 1982) 10
United States v. Estate of Donnelly, 397 U.S. 286 (1970) 16
United States v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3314 (U.S. Oct. 27, 1992) 10, 13
Van Vranken v. Atlantic Richfield Co., 890 F.2d 421 (Temp. Emer. Ct. App. 1989), *cert. denied*, 494 U.S. 1005 (1990) 5

CONSTITUTION

U.S. Constitution, Art. III ..... *passim*

STATUTES AND ACTS

28 U.S.C. § 1254(1) (1988) 2

TABLE OF AUTHORITIES—Continued

Page

Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1988) 2

REGULATIONS

10 C.F.R. § 212.126(d)(2) 5
10 C.F.R. § 212.83 (1975) 3
6 C.F.R. § 150.355 (1973) 3
6 C.F.R. § 150.356 (1973) 3
Mandatory Petroleum Price Regulations, 46 Fed. Reg. 7776 (1981) (final rule) 4

FEDERAL REGISTER

Notice of Proposed Consent Order and Opportunity for Public Comment, 50 Fed. Reg. 8366 (1985) .. 5

MISCELLANEOUS

Presidential Signing Statement re S. 1569 (October 29, 1992) 10
OMB, *Regulatory Program of the United States* 721 (1992) 12

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Atlantic Richfield Company ("ARCO") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals of the United States entered on August 27, 1992.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals of the United States is not yet reported and is reproduced at Appendix A. The unreported order of that court denying petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* is reproduced at Appendix E. The unreported order and the memorandum opinion of

the United States District Court for the District of Columbia, which is published at 772 F. Supp. 654 (D.C. D.C. 1991), are reproduced at Appendices B and C respectively. The decision and order of the Department of Energy, reported at 21 DOE (CCH) ¶ 80,104 (1991), is reproduced at Appendix D.

JURISDICTION OF THIS COURT

The decision and judgment of the Temporary Emergency Court of Appeals was issued on August 27, 1992. On October 6, 1992, the Temporary Emergency Court of Appeals entered an order denying the timely Petition for Rehearing and Suggestion for Rehearing *En Banc* of Plaintiff-Appellant Atlantic Richfield Company.

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1988) and section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1988).

STATEMENT OF THE CASE

Under this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), if a new rule of federal law is applied to the party in the proceeding in which the rule is announced, that new rule must be applied to all other similarly situated parties whose claims are not otherwise barred by procedural requirements or *res judicata*.[1] In the *Mobil* trilogy,[2] the Temporary Emer-

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[1] *Beam*, 111 S. Ct. at 2448. Although this rule was announced in Justice Souter's plurality opinion in *Beam*, the concurring opinions in the case make clear that six Justices concurred in the rule. *Beam*, 111 S. Ct. at 2448 (White, J., concurring); 111 S. Ct. at 2449-50 (Blackmun, J., concurring); 111 S. Ct. at 2450-51 (Scalia, J., concurring).

[2] *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 804 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) (*"Mobil I"*); *Mobil Oil Corp. v. DOE*, 647 F.2d 142, 145 (Temp. Emer. Ct. App. 1981) (*"Mobil II"*); *Mobil Oil Corp. v. DOE*, 678 F.2d 1083, 1090 (Temp. Emer. Ct. App. 1982) (*"Mobil III"*).

gency Court of Appeals ("TECA") determined that an amendment to a Department of Energy ("DOE")[3] regulation (the old rule) was substantively and procedurally unlawful, and applied the original unamended regulation (the new rule) to Mobil. The court below, however, held that the *Beam* choice-of-law does not apply to judicial decisions finding a federal agency regulation invalid and consequently failed to apply the new *Mobil* rule to ARCO.

A. The Federal Price Controls and the *Mobil* Litigation

Under the DOE price control regulations, a refiner's maximum lawful sales price ("MLSP") on refined products covered by the price control regulations was limited to its increased costs over a base period price. A refiner could recover all of the increased costs it incurred in a particular month, or could save a portion of its increased costs in its "banks" for recovery in a subsequent month.[4] Prior to February 1976, a refiner's increased costs were allocated among covered products by the so-called "V factor."[5]

In *Mobil I*, TECA held that DOE's April 1974 amendment to its V factor regulation (the old rule) was invalid on substantive and procedural grounds.[6] The consequence of this decision was to reinstate DOE's preexisting unamended V factor regulation (the new rule), which allowed refiners to allocate more cost increases to the covered products than under the old rule, and to establish a higher MLSP for covered products. The new rule was retroactively applied to Mobil: Mobil was allowed to reallocate its crude oil costs in accordance with the new rule, thus increasing its MLSP and reducing its potential overcharge liability in government and private overcharge

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[3] The term "DOE" is used here to include its predecessor agencies.

[4] 6 C.F.R. § 150.355 (1973); 10 C.F.R. § 212.83 (1975).

[5] 6 C.F.R. § 150.356 (1973); 10 C.F.R. § 212.83 (1975).

[6] *Mobil I*, 610 F.2d at 802, 804.

cases.[7] In its petition for certiorari to this Court in *Mobil I*, the government contended that this Court's review was needed because otherwise the new rule would apply to other refiners with significant financial consequences: "The agency estimates that refiners will claim a minimum of $17 to $18 billion in additional [cost] credits for the period April 30, 1974 through February 1, 1976, based solely on the decision below." [8]

Following denial of certiorari,[9] DOE continued its efforts to impose the old rule. However, after remand to the district court and upon subsequent appeal, TECA reaffirmed the invalidity of the old rule, and permitted Mobil "to reallocate its costs in accordance with the unamended V factor for the period between the 1974 amendment and February 1976." App. A at 3a (citing *Mobil II*). On January 23, 1981, DOE repromulgated its previously invalidated amendment (the old rule), attempting to cure the procedural and substantive defects, and seeking to apply it retroactively to the April 1974 to February 1976 period.[10] However, TECA invalidated this retroactive repromulgation of the old rule on the ground that the old rule was unnecessary to fulfill the statutory design. *Mobil III*, 678 F.2d at 1090.

B. The Proceedings Below

Following the promulgation of the amended V factor regulation in April 1974, ARCO was required to file its Refiner's Monthly Cost Allocation Reports ("RMCARs") with DOE in accordance with the old rule. Shortly after TECA determined that the old rule was unlawful in *Mobil I*, ARCO sought to refile its RMCARs with DOE,

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[7] *Mobil I*, 610 F.2d at 804-05; *Mobil II*, 647 F.2d at 145-47.

[8] App. G at 80a.

[9] *DOE v. Mobil Oil Corp.*, 446 U.S. 937 (1980).

[10] Mandatory Petroleum Price Regulations, 46 Fed. Reg. 7776 (1981) (final rule).

adjusting its V factors to conform to the new rule. While *Mobil II* and *Mobil III* were still in litigation, DOE denied three different attempts by ARCO to refile its RMCARs in accordance with the new rule. ARCO's fourth refiling request had not been formally resolved when DOE and ARCO settled all of the refiner enforcement issues in 1985.[11]

In private overcharge litigation,[12] ARCO sought to use V factors computed pursuant to the new rule, rather than the V factors ARCO had been required to use under the old rule. After TECA held that ARCO could not automatically reallocate its costs without having obtained DOE's permission to refile its RMCARs,[13] ARCO applied in 1989 to DOE for permission to refile its RMCARs in accordance with the new rule. This refiling would have provided ARCO the same remedy awarded Mobil—a "reallocat[ion of] its costs in accordance with the unamended V factor for the period between February 1974 and February 1976." App. A at 3a (citing *Mobil II*). DOE's Office of Hearings and Appeals ("OHA") affirmed the *sub silentio* denial of ARCO's application by DOE, on the principal ground that the *Mobil* decisions did not constitute "good cause" [14] for permitting ARCO to refile its

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[11] *See* Notice of Proposed Consent Order and Opportunity for Public Comment, 50 Fed. Reg. 8366 (1985).

[12] *Van Vranken v. Atlantic Richfield Co.*, No. 79-0627 (N.D. Cal.). A jury awarded a verdict of $22.8 million in this case in July 1992. A judgment, including substantial prejudgment interest, is expected to be entered soon and appeals will follow. If this Court reverses the decision below, then ARCO's potential liability would probably be either eliminated entirely or substantially reduced.

[13] *Van Vranken v. Atlantic Richfield Co.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989) (interlocutory appeal), *cert. denied*, 494 U.S. 1005 (1990).

[14] 10 C.F.R. § 212.126(d)(2) provides that a refiner seeking to refile its RMCARs for periods more than one year prior to the refiling is required to obtain written permission from DOE "for good cause shown."

RMCARs in accordance with the new rule.[15] In a decision issued two months after *Beam* was decided, the district court (which did not have the benefit of argument on the applicability of *Beam*) affirmed OHA.[16] TECA affirmed the district court.[17]

TECA acknowledged the difficulty in applying *Beam* since "*Beam* is a relatively recent decision, its scope has not yet been judicially determined," and "*Beam* was a plurality decision in which the justices differed greatly in their rationale for the judgment." [18] The court below believed that not all of the rationales prohibiting selective prospectivity in *Beam* applied here.

TECA held that *Beam* did not apply to federal court decisions invalidating agency regulations because only Justice Stevens joined Justice Souter's plurality opinion resting on the principles of equality and *stare decisis*. The court below reasoned that because the concurring opinions of Justices Blackmun and Scalia, joined by Justice Marshall, were based on Article III of the Constitution, their opinions in *Beam* were inapplicable to invalidations of agency regulations. TECA concluded: "Thus, *Beam* does not clearly preclude selective prospectivity in this case." [19]

TECA further held that, even if *Beam* applied to judicial decisions finding federal regulations invalid, *Beam* itself left the courts free in cases following announcement of the new rule to consider the equities in the subsequent case, and to apply a different remedy to litigants who were not parties to the case in which the new rule was

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[15] App. D at 52a, 61a.

[16] App. C at 12a.

[17] App. A at 1a, 10a.

[18] App. A at 7a.

[19] App. A at 8a.

adopted.[20] However, TECA did not cite any of the equitable considerations contemplated in *Beam*. Instead, the court below held that the "equitable factor" that justified treating ARCO differently from Mobil, and denying ARCO *any* relief, was that ARCO's original cost allocations were not unlawful under either the valid or the invalid V factor regulations at issue in the *Mobil* litigation.

On September 10, 1992, ARCO filed a timely petition for Rehearing and Suggestion for Rehearing *En Banc*, pointing out the conflict between the panel's decision and the decisions by other courts, and arguing that the TECA panel had erroneously applied *Beam*. The petition was denied by order entered on October 6, 1992.[21]

REASONS FOR GRANTING THE WRIT

This petition presents the Court with the opportunity to resolve a conflict among the Courts of Appeals as to whether the prohibition against selective prospectivity announced in *Beam* applies to federal court decisions invalidating agency regulations. This principle that prospectivity cannot be applied selectively goes to the heart of American jurisprudence. If courts can apply new rules of law on a selective basis, then the fundamental policies underlying *Beam* of equality, *stare decisis*, and the constitutional requirements of Article III are all undermined.

The decision in the court below, which declined to apply *Beam* to its own decisions invalidating a DOE regulation, conflicts with decisions of the Court of Appeals for the Eighth Circuit and other federal courts. TECA believed that the new rule announced in *Mobil* applied only to Mobil and not to absent litigants. However, the Eighth Circuit has held that *Beam* does apply to absent litigants where an earlier federal court decision invali-

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[20] Such parties will be referred to as "absent litigants."

[21] App. E at 62a.

dated an agency regulation and applied that decision retroactively to the original party challenging the regulation.

An early resolution of this conflict is imperative. Regulated firms frequently challenge the validity of regulations by bringing "test" cases and the federal courts often invalidate agency regulations and practices. Until this Court provides authoritative guidance, prudent regulated parties will be required to file their own "replicative lawsuits" [22] each time a regulation is challenged to ensure that any decision invalidating the regulation will apply to them; lower courts will not know whether a decision invalidating a regulation will apply to absent litigants; and after a regulation has been found invalid, federal agencies will be unsure whether they should use scarce resources to enforce that regulation against absent litigants for past conduct.

In addition, this petition presents the question of whether a court can evade *Beam*'s choice-of-law rule by refusing to grant any remedy to a similarly situated party on the ground that the regulated entity complied to its detriment with a rule subsequently declared invalid. TECA denied ARCO the benefit of *Beam* because of TECA's view that it was not unlawful for ARCO to charge a lower price than it was allowed under the new rule adopted in *Mobil*. If left standing, the decision below would have far-reaching consequences. For example, a taxpayer who pays a tax that is subsequently invalidated would be denied relief because it was "lawful" to have paid the invalidated tax, *i.e.*, to have paid more in tax than the taxpayer validly owed. Thus, the decision below would even preclude the award of a remedy in *Beam* itself.

This Court should grant a writ of certiorari to resolve the profound uncertainty over whether *Beam* applies to

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[22] *Beam*, 111 S. Ct. at 2447.

judicial decisions invalidating agency regulations. Alternatively, this Court should defer action on this petition, pending a decision in *Harper v. Virginia Dep't of Taxation*, 410 S.E.2d 629 (Va. 1991), *cert. granted*, 112 S. Ct. 1934 (1992), a case presenting similar issues regarding the retroactive application of new rules.

I. TECA'S REFUSAL TO APPLY *BEAM* TO ITS DECISION INVALIDATING AN AGENCY RULE CREATES A CONFLICT WITH ANOTHER COURT OF APPEALS, AND WITH THIS COURT'S DECISION IN *BEAM*

A. The Decision Below Conflicts With Decisions of the Eighth Circuit and the Court of International Trade

TECA recognized that *Beam* "may extend beyond a purely constitutional context. . . ." [23] However, TECA declined to apply *Beam*'s prohibition on selective prospectivity to its *Mobil* decisions invalidating a DOE regulatory amendment. App. A at 9a. While TECA noted that Justice Souter's plurality opinion "was based on the principles of *stare decisis*, equality, and the rule of law generally," App. A at 7a, it focused on the separate opinions of Justices Blackmun and Scalia in which they had concurred in the result "on the grounds that Article III prohibited prospectivity for the Court's new rules of decision." *Id.* (citation omitted). Because Article III considerations are inapplicable to agency decisions,[24] the court below reasoned that "*Beam* does not clearly preclude selective prospectivity in this case." *Id.*[25]

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[23] App. A at 7a.

[24] TECA cited *District Lodge 64 v. NLRB*, 949 F.2d 441, 447 (D.C. Cir. 1991) (whether *Beam* should apply to decisions of a federal agency is unclear).

[25] In the Petition for Rehearing, ARCO suggested that whether *Beam* applies to an "agency decision," in the sense that an *agency* must apply the *Beam* choice-of-law principle when the *agency* announces a new rule or interpretation, is not relevant to the instant

TECA's decision conflicts with the decisions of the Court of Appeals for the Eighth Circuit and of the Court of International Trade. Those decisions have applied *Beam*'s prohibition on selective prospectivity where there were prior appellate court decisions that, like the TECA decisions in *Mobil*, invalidated or set aside agency regulations or methodologies.

In *United States v. Goodner Brothers Aircraft, Inc.*,[26] the Eighth Circuit applied *Beam* to hold that, because an earlier D.C. Circuit decision had invalidated an EPA rule on procedural grounds and had implicitly applied the invalidation retroactively to the parties in that decision, the invalidation of the EPA rule had to be applied to other regulated parties as well.[27] By contrast, the court below refused to apply *Beam* even though its own prior decisions invalidated the agency's V factor rule.[28]

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case. The rule ARCO is seeking to have applied under *Beam* is a rule of law announced by TECA in the *Mobil* trilogy, "that the 1974 amendment to the regulations was invalid." App. A at 9a. Thus, the new rule in *Mobil* was decided by an Article III federal appellate court, not an agency.

[26] 966 F.2d 380, 385 (8th Cir. 1991), *petition for cert. filed*, 61 U.S.L.W. 3314 (U.S. Oct. 27, 1992) (92-607) (petition filed on other grounds).

[27] If, under *Goodner*, *Beam* should be applied where an agency rule is invalidated only on procedural grounds, it should *a fortiori* be applied where, as in *Mobil*, the agency's rule was invalidated by TECA because of substantive as well as procedural infirmities.

[28] On October 29, 1992, President Bush signed S. 1569, which phases out TECA and consolidates appeals that had formerly gone to TECA with the Court of Appeals for the Federal Circuit. The TECA precedents will be binding in the Federal Circuit. *See South Corp. & Seal Fleet, Inc. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (*en banc*) ("holdings of predecessor courts . . . shall be binding as precedent in this court"). *See also Presidential Signing Statement re S. 1569* (October 29, 1992) (President "hope[s] and expect[s] that the Federal Circuit will adopt TECA precedent, just as the Federal Circuit earlier adopted Court of Claims precedent when its appellate jurisdiction was transferred to the Federal Circuit.") (App. H at 81a). Therefore, this case still presents a

Since this issue will arise whenever a federal agency's regulation or methodology is challenged in a federal court, it is not surprising that other cases raising this issue are wending their way through the federal judicial system. For example, in *Ceramica Regiomontana, S.A. v. United States*,[29] the Court of International Trade was confronted with a Department of Commerce methodology for calculating country-wide countervailing duty rates which the Court of Appeals for the Federal Circuit had previously set aside. On the basis of *Beam*, the Court of International Trade held that because the invalidation of the agency methodology in the earlier Federal Circuit decision "was applicable to the parties therein on remand, *Beam* requires that it be applied to this case."[30] This holding—that *Beam* requires the previous invalidation of the agency methodology to be applied to absent litigants—also conflicts squarely with TECA's decision.[31]

B. The Court's Prompt Resolution of This Conflict Is Imperative

The Court should grant this petition to resolve this conflict as quickly as possible because continued uncertainty will lead to confusion and wasted resources. Until the Court provides authoritative guidance, each time a federal regulation is challenged regulated parties must file "replicative suits"; and each time a federal court finds a

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conflict among the Courts of Appeals that this Court should resolve for the reasons discussed in the next section.

[29] App. F at 63a, *amended on other grounds*, No. #92-76, 1992 Ct. Intl. Trade LEXIS 71 (Ct. Int'l Trade May 19, 1992).

[30] App. F at 76a.

[31] App. F at 76a. *See also Barr v. McGraw-Hill*, 770 F. Supp. 855, 861 (S.D.N.Y. 1991) ("Nothing in Justice Souter's opinion, or the concurring opinions of Justices Blackmun and Scalia, indicates that the Court's analysis in *Jim Beam* is intended to be limited to newly announced constitutional rules, and not applicable to newly announced interpretations of statutes or *regulations* . . .") (emphasis added).

federal agency regulation invalid the effect of that decision will be in doubt. Will the decision invalidating a federal regulation apply to absent litigants, as in the Eighth Circuit? Or will the governing standard be TECA's determination that a decision invalidating a federal regulation does not apply to absent litigants?

While this Court sometimes declines to act despite a conflict among the Courts of Appeals and resulting uncertainty, the uncertainty involved here is pervasive, touching nearly all regulated entities, federal courts and federal agencies. Every year, the federal agencies promulgate thousands of new regulations. In 1990 alone, federal agencies enacted 4,765 regulations.[32] By their very nature, most of these federal regulations have nationwide applicability, controlling the economic relations, health and safety of almost all corporations and individuals. In due course, many of these regulations are subjected to judicial challenge and some are found to be invalid. The uncertainty arising from the decision below and the split among Courts of Appeals may cause federal courts, federal agencies and nearly everyone covered by federal regulations to waste resources because they do not know whether new rules finding agency regulations invalid will apply to absent litigants. This uncertainty will create precisely the problems that the prohibition on selective prospectivity was intended to avoid.

Perhaps the greatest effect of the uncertainty precipitated by the split among the Courts of Appeals is on regulated parties. Previously, regulated parties have been content to observe a "test" case challenging a federal agency regulation from the sidelines. However, the impact of the split among the Courts of Appeals is that regulated parties do not know whether a challenge by another party to a federal regulation, if successful, would apply to them. Therefore, prudent regulated parties are

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[32] OMB, *Regulatory Program of the United States* 721 (1992).

forced to file the very "replicative suits" [33] that *Beam* was intended to avoid whenever a federal regulation is challenged by another party.

The tremendous uncertainty caused by the split in the Courts of Appeals will affect the lower courts in three ways. First, already overburdened federal courts will suffer an increase in the filing of "replicative suits," which will multiply the number of lawsuits each time a challenge to federal regulation is raised in court. Second, courts will obviously be uncertain whether a prior judicial decision invalidating a federal regulation must be given retroactive effect to absent but similarly situated parties. Third, this split among the Courts of Appeals engenders significant uncertainty for a court considering an initial challenge to federal regulations. The court will not know whether a decision invalidating a regulation retroactively for the litigant before it would apply to similarly situated parties who are absent. A critical benefit of the prohibition on selective prospectivity is that it requires courts to weigh their departure from *stare decisis* against "the disruption that [its] new decisional rules cause." *Beam*, 111 S. Ct. at 2450 (Blackmun, J., concurring). This uncertainty will mean that the salutary effect of the prohibition on selective prospectivity that *Beam* was intended to foster would be lost.

This split in authority also leaves federal agencies in a quandary. Under the Eighth Circuit's decision in *Goodner*, an agency cannot apply an invalidated regulation to the conduct of absent litigants during the time the regulation was outstanding. However, under the decision below, an agency is permitted to continue its efforts to enforce the old regulation against absent litigants for past conduct. As a result of this uncertainty, federal agencies

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[33] "[D]istinguishing between those with cases pending and those without would only serve to encourage the filing of replicative suits when this or any other appellate court created the possibility of a new rule by taking a case for review." *Beam*, 111 S. Ct. at 2447.

will be uncertain whether to allocate their scarce enforcement resources to enforcing the old regulation against absent litigants for past conduct or whether they are required to apply the new rule instead.

Until this Court resolves this uncertainty, absent litigants will file "replicative suits," lower courts will announce new rules without considering their application to third parties and federal agencies will enforce invalid regulations. Since the issue of whether a court decision finding an agency regulation invalid applies to absent litigants is squarely presented here, nothing would be gained by delaying the resolution of this issue of national importance.

II. COURTS SHOULD NOT BE PERMITTED TO EVADE THE PROHIBITION OF SELECTIVE PROSPECTIVITY BY REFUSING TO AWARD ANY REMEDY TO A PARTY THAT COMPLIED WITH THE OLD RULE

The decision below would eviscerate this Court's prohibition of selective prospectivity. *Beam* contemplated that, when a court applies a new rule of law retroactively, certain equitable considerations could be taken into account in fashioning the remedy. *Beam*, 111 S. Ct. at 2448. However, *Beam* also contemplated that, absent a state law bar to recovery, *some remedy* would be provided to any litigant to whom the principles of *Beam* applied.

TECA held that even if *Beam* were applicable, ARCO was not entitled to *any* remedy because its original cost allocations were "legal and proper" under both the old rule and the new rule. App. A at 8a-9a. Accordingly, the court below held that even if the new rule applied to ARCO as well, ARCO was not entitled to any remedy.

TECA's decision on the "remedial" issue is a thinly veiled attempt to avoid this Court's prohibition on selective prospectivity, and to insulate the decision from further appellate review by this Court. TECA's decision ef-

fectively evades *Beam*'s prohibition on selective prospectivity by denying ARCO *any remedy*. In addition, the consideration cited by the court to deny any remedy to ARCO and which it characterized as "equitable"—that ARCO's original RMCAR filings were "legal and proper" under both the old rule and the new rule—is not the type of "equitable consideration" contemplated by *Beam*. This "equitable consideration" could be used to deny a remedy to most absent litigants when a new rule is adopted, including Beam itself.

A. The Decision Below Evades *Beam* by Refusing To Provide Any Remedy

If a court can deny any remedy to an absent but similarly situated litigant on the basis of equitable considerations, it can evade the *Beam* holding that "precludes retroactive application of a new rule to some litigants when it is not applied to others. . . ." *Beam*, 111 S. Ct. at 2447 (citations omitted). Thus, a court could readily undermine the fundamental principles promoted by the prohibition on selective prospectivity: equality, *stare decisis*, and the limitations on judicial power in Article III.[34]

Beam clearly contemplated that *some* form of remedy would be provided to a litigant, such as ARCO, to whom *Beam* applies. While Justice Souter refused to speculate about "the remedy that may be appropriate in this case," *Beam*, 111 S. Ct. at 2448, he expressed no doubts about *whether* a remedy may be appropriate. He also recognized that reliance interests may be entitled to considera-

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[34] *See Beam*, 111 S. Ct. at 2446-48 (principles of equality and *stare decisis* prohibit selective prospectivity), 2488 (White, J., concurring) (principle of *stare decisis* prohibits selective prospectivity), 2449-50 (Blackmun, J., concurring) (principles of equality, *stare decisis* and limitations on judicial power in Article III prohibit selective prospectivity), 2450-51 (Scalia, J., concurring) (principle of limitation on judicial power in Article III prohibits selective prospectivity).

tion in determining "the *nature* of the remedy that *must* be provided. . . ." 111 S. Ct. at 2448 (emphasis added). Similarly, Justice Harlan's concurring opinion in *Estate of Donnelly*, to which *Beam* cites in pertinent part, states that equitable considerations should be taken into account in determining "*what* relief is appropriate in any given case," not *whether* any relief is appropriate.[35]

The court below effectively applied the old pre-*Mobil* rule to ARCO by denying it any remedy. *Beam*'s continued vitality depends on a determination that federal courts cannot refuse to apply *Beam*'s choice-of-law rule by denying any remedy to a litigant entitled to benefit from the new rule.

B. The Basis On Which TECA Denied ARCO Any Relief Was Inappropriate Under *Beam* and Establishes a Principle That Would Nullify *Beam*

Even if equitable considerations might warrant denial of any remedy to a litigant entitled to benefit from a new rule of law, the factor chosen by the court below to deny any remedy to ARCO was not the kind of equitable consideration permitted by *Beam*. Justice Souter's opinion in *Beam*, and cases cited therein, identified several equitable considerations that a court might properly take into account in fashioning an appropriate remedy for a litigant to whom the *Beam* choice-of-law rule applied. These equitable considerations included:

- state law provisions or considerations that might affect the fashioning of a proper remedy by a federal court;[36]

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[35] *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan J., concurring) (emphasis added).

[36] Citing to *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984) (the decision held retroactively applicable to third parties in *Beam*), Mr. Justice Souter observed that "federal 'issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law.'" *Beam*, 111 S. Ct. at 2448.

- the reliance interests of affected parties on the old rule of law;[37] and
- whether the litigant had "passed on" to customers the economic incidence of a tax under a statute subsequently declared invalid so that a refund might be inappropriate.[38]

None of these equitable considerations is present here, and none was cited by TECA. The consideration invoked by TECA—that ARCO's conduct was legal under both the old and the new rules—is not even remotely related to even the most expansive reading of any of the types of equitable considerations contemplated in *Beam*.

The decision below would eliminate any remedy in most cases where *Beam* was intended to apply, including *Beam* itself. It is of course a truism that any time a regulation or law specifies that a regulated party may charge "no more" than a particular price, it is always "legal and proper" under that regulation to charge less than the maximum price—or indeed to charge nothing at all. In this case, under the price control regulations it was not unlawful for ARCO to charge a price lower than the MLSP. In that narrow sense, ARCO's original cost allocations were permissible—they were "legal"—under both the old and the new DOE rules. But this consideration is completely beside the question of whether TECA's invalidation of the amended V factor regulation in the *Mobil* litigation required that court to provide ARCO some remedy.

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[37] *Beam*, 111 S. Ct. at 2448 (citing to Mr. Justice Harlan's concurring opinion in *United States v. Estate of Donnelly*, 397 U.S. at 296, and to *Lemon v. Kurtzman*, 411 U.S. 192, 203 (1973)) (recognizing that denial of reimbursement to schools which had incurred significant expenses in reliance on a subsequently invalidated state statute authorizing reimbursement would impose a substantial burden on the schools).

[38] These "pass-on" considerations were identified by the Supreme Court in *Bacchus* itself, 468 U.S. at 276-77, when it remanded the case to the state court for determination of the appropriate relief.

Indeed, the consideration that TECA relied on to deny ARCO any relief would be equally applicable to *Mobil* itself. It would have been legal for Mobil to charge a lower price than it was entitled to charge under the new rule announced in that case. Yet Mobil was permitted to reallocate its costs in accordance with the new rule while ARCO was not. The court below provided no basis for distinguishing between ARCO and Mobil on equitable grounds.

The critical consideration is that, in the absence of the invalidated DOE regulation, ARCO would not have voluntarily allocated its costs to covered products as it did. In *Beam*, it was likewise not "unlawful" for Beam to have paid the invalidated liquor tax or, indeed, to have volunteered to pay more in tax than the invalid law required. Thus, the decision below would preclude any remedy in *Beam* itself.

Worse yet, the teaching of the decision below would appear to be that if a regulation is being challenged, regulated entities other than the party bringing the challenge who believed the regulation to be invalid would be better off violating the regulation (so as to avoid the ground on which TECA denied relief to ARCO) than complying with it pending the outcome of the challenge. This case presents the Court with an opportunity to make it clear that this Court's prohibition on selective prospectivity cannot be avoided by awarding no remedy, and that a regulated entity does not have to file a replicative suit or flout a regulation to benefit from a decision invalidating a regulation.

CONCLUSION

For these reasons a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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November 5, 1992

APPENDICES

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. DC-117

ATLANTIC RICHFIELD COMPANY,
Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,
Defendant-Appellee,

and

DON VAN VRANKEN on behalf of himself
and all others similarly situated,
Intervenors-Appellees.

Appeal from the United States District Court
for the District of Columbia

(District Court No. 91-465)

(Argued: April 1, 1992 Decided: August 27, 1992)

SHELDON E. HOCHBERG, David L. Roll and Pantelis Michalopoulos, Steptoe & Johnson, Washington, D.C. and Richard C. Morris, Atlantic Richfield Company, Los Angeles, California, were on the brief for Plaintiff-Appellant.

RICHARD F. AHERN, Don W. Crockett and Thomas Sacco, Judicial Litigation Division, Economic Regulatory Administration, U.S. Department of Energy, Washington, D.C., were on the brief for Defendants-Appellees; TRACY

R. KIRKHAM, Hennigan & Mercer, with whom Josef D. Cooper, Law Offices of Josef D. Cooper, San Francisco, California, and William C. Barnard, Sommers & Barnard, Indianapolis, Indiana, were on the brief for Intervenor-Defendants-Appellees.

Before GRANT, PECK, and WEIGEL, Judges.

PECK, Judge:

This appeal arose from the denial by the Office of Hearings and Appeals (OHA) of ARCO's application to refile Refiner's Monthly Cost Allocation Reports (RMCARs). The district court affirmed OHA's denial. For the reasons stated below, we affirm the district court.

FACTS

During the period of petroleum price controls, the applicable regulations permitted oil refiners to incorporate increased crude oil costs into the prices of their refined products covered by the regulations. The formula for allocating costs to price increases for the covered goods was referred to as the V factor. The V factor entailed taking the total volume of a given covered product sold and dividing by the total volume of all covered products sold. The resulting fraction was then used to determine the portion of increased crude oil costs that could be attributed to the covered product. Oil refiners could either increase the price of the covered product or bank the increased costs to offset overcharges.

When the Economic Stabilization Act (ESA) expired on April 30, 1974, the Emergency Petroleum Allocation Act (EPAA) succeeded it as the vehicle for administering the price controls. Under the EPAA and the accompanying Department of Energy (DOE) regulations, certain products which had been regulated under the ESA were no longer subject to price controls. Under the new regulations, the increased cost of crude oil used to produce the newly exempt products was included in the total

increased cost of producing covered goods, but the volume of the exempt goods sold was not included in the denominator of the V factor. Therefore, the oil companies could pass on the increased crude oil costs to produce newly exempt products in the price of both the newly exempt goods and the covered goods. In an eleventh hour attempt to prevent this result, DOE passed an emergency amendment to the regulations on April 30, 1974 which included the volume of newly exempt goods in the denominator of the V factor and thus prevented refiners from allocating increased crude oil costs from exempt goods to the price of the covered products. DOE promulgated the amendment without an opportunity for notice or comment.

As a refiner, ARCO was required to file Refiner's Monthly Cost Allocation Reports (RMCARs). After the promulgation of the emergency amendment, ARCO consistently filed its RMCARs using the amended V factor. However, Mobil Oil challenged the amendment in court. In *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) (*Mobil* I), this court affirmed the district court's determination that the amendment was substantively and procedurally invalid because DOE had failed to consider the relevant factors set forth in § 4(b) of the EPAA, 15 U.S.C. § 753(b)(1) and failed to provide notice to interested parties and an opportunity for comment. After remand and a second appeal, this court ruled that Mobil was permitted to reallocate its costs in accordance with the unamended V factor for the period between the 1974 amendment and February 1976. *Mobil Oil Corp. v. Dep't of Energy*, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) (*Mobil* II). In 1981, DOE attempted to repromulgate and retroactively apply the 1974 amendment. However, in *Mobil v. Dep't of Energy*, 678 F.2d 1083, 1090 (Temp. Emer. Ct. App. 1982) (*Mobil* III), this court invalidated the regulation.

In March 1979, DOE promulgated a refiling regulation which provided that after May 31, 1979, any refiner wishing to refile a revised RMCAR for a period more than one year prior to the refiling would have to obtain written permission from DOE "for good cause shown." 10 C.F.R. § 212.126(d). The regulation also stated:

> DOE will not make a finding of good cause routinely. Where it appears that such a finding may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify did not result from a failure to exercise due care or diligence.

In March and April 1980 and August 1981, ARCO requested permission from DOE to refile its RMCARs using the unamended V factor. In each case, DOE rejected these refilings as premature pending final resolution of the *Mobil* litigation. In March 1982, ARCO again requested permission to refile. DOE did not respond to this request and ARCO did not pursue the matter. Shortly thereafter, ARCO and DOE entered into settlement negotiations regarding ARCO's compliance with the price control regulations. The negotiations resulted in a settlement and consent order in which the unamended V factor was used.

Meanwhile, in 1979, Don Van Vranken and other ARCO wholesale customers, who are intervenors in this case, brought suit in federal court alleging that ARCO had overcharged resellers for covered goods. *Van Vranken v. Atlantic Richfield Corp.*, 699 F. Supp. 1420 (N.D. Cal. 1988), *affd*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989). In considering whether ARCO had overcharged its customers, the district court had to review ARCO's calculation of its banks of unrecovered costs which would be used to offset overcharges. Thus, the effect of the invali-

dation of the 1974 amendment became important with regard to calculating ARCO's banked costs. In a summary judgment motion, ARCO argued that the *Mobil* cases allowed it to retroactively reallocate its costs. The practical effect of such a reallocation would have been that ARCO could increase its banked costs and reduce its overcharge liability. The district court rejected ARCO's argument holding that the *Mobil* decisions did not automatically allow ARCO to reallocate its costs. *Id.* at 1424.

On appeal, this court held that the *Mobil* cases neither required nor permitted ARCO to retroactively reallocate its costs. *Van Vranken v. Atlantic Richfield Corp.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989). The court reasoned that ARCO was not required to reallocate costs because it was not unlawful for ARCO to have priced its goods below the fixed maximum price by using the amended V factor. The court also stated that ARCO was not permitted to reallocate its costs because it had failed to obtain permission from DOE as required by the regulations. Furthermore, the court ruled that ARCO had waived it right to relief by failing to challenge the amendment in a timely manner.

In December 1989, ARCO applied for permission to refile its RMCARs claiming that this court's decision in *Van Vranken* necessitated the action. DOE did not respond to the application. ARCO treated DOE's silence as a denial and appealed to the OHA.

In February 1991, OHA upheld DOE's *sub silentio* denial. OHA concluded that the *Mobil* decisions did not constitute "good cause" under the regulation for ARCO's refilings. OHA relied on the *Van Vranken* decision and its holdings that the *Mobil* decisions did not require or permit ARCO to refile its costs. As an alternative ground for denying the application, OHA determined that ARCO had failed to satisfy the "due care and diligence" provision of the refiling regulation. ARCO appealed OHA's

decision to the district court. In March 1991, the district court affirmed OHA's decision to deny ARCO's application on the grounds that there was no good cause for the refiling and the alternative grounds. This appeal followed.

STANDARD OF REVIEW

Judicial review of OHA's decision is limited by § 211 (d) (1) of the ESA which provides:

> [N]o order of [DOE] shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

12 U.S.C. § 1904, note, incorporated by reference in the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 754(a)(1). Furthermore, this court has stated that because Congress authorized administrative control in DOE, "the judicial role requires approval of the DOE's decision if there is a rational basis for it." *Thriftway Co. v. Dep't of Energy*, 867 F.2d 1577, 1580 (Temp. Emer. Ct. App. 1989) (citing *City of Long Beach v. Dep't of Energy*, 754 F.2d 379, 385 (Temp. Emer. Ct. App. 1985)). Furthermore, DOE's interpretation of its regulations is entitled to great deference due to the agency's expertise and the difficulty of judicial administration of complex programs dealing with the petroleum industry. *Id.* at 1580-81.

ANALYSIS

On appeal, ARCO's primary argument is that the *Mobil* decisions constitute "good cause" for the purposes of the refiling regulation. Although ARCO's similar argument that the *Mobil* cases required or permitted ARCO to reallocate its costs was rejected by this court in *Van Vranken, supra*, ARCO now argues that the Supreme Court's decision in *James B. Beam Distilling*

Co. v. Georgia, 111 S. Ct. 2439 (1991) (plurality) requires this court to allow ARCO to retroactively allocate V factor costs as Mobil did at the conclusion of the *Mobil* litigation. We cannot agree.

Beam involved the validity of a Georgia law which imposed an excise tax on imported liquor which was double the tax imposed on alcohol made from products grown in Georgia. In 1984, the Supreme Court held a similar Hawaii statute to be violative of the Commerce Clause in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). The question presented in *Beam* was whether the *Bacchus* decision should apply retroactively to the claims in *Beam* which arose from facts antedating the *Bacchus* decision. Justice Souter held that *Bacchus* should be aplied retroactively stating "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Beam*, 111 S. Ct. at 2448.

Since *Beam* is a relatively recent decision, its scope has not yet been judicially determined. Whether *Beam* has any application to agency adjudications is questionable. We note that the holding involved the application of a new constitutional rule. While the Court's remand in light of *Beam* of *Northwest Savings Bank, PaSA v. Welch*, 111 S. Ct. 2882 (1991), a case concerning the retroactive application of a statute of limitations, suggests that *Beam*'s application may extend beyond a purely constitutional context, there is no indication that regulatory matters are within its scope.

Furthermore, as noted in *District Lodge 64 v. N.L.R.B.*, 949 F.2d 441, 447 (D.C. Cir. 1991), *Beam* was a plurality decision in which the justices differed greatly in their rationale for the judgment. Justice Souter's opinion joined only by Justice Stevens, was based on the principles of *stare decisis*, equality, and the rule of law generally. *Beam*, 111 S. Ct. at 2444, 2446. However, Justices Blackmun and Scalia in separate opinions, joined by

Justice Marshall, concurred in the judgment on the grounds that Article III prohibited prospectivity for the Court's new rules of decision. *Id.* at 2449-51. While the principles of equality and the rule of law would seem applicable to agency decisions, Article III considerations are inapplicable in this context. Thus, *Beam* does not clearly preclude selective prospectivity in this case.

Finally, in his opinion concurring in the judgment, Justice White articulated his belief that the scope of *Beam's* holding was not all-encompassing. He stated that without overruling *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and other cases which hold that certain decisions will be applied prospectively only, one could not "sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system." *Beam*, 111 S. Ct. at 2449.

Moreover, even if *Beam* is applicable to this case, its application does not entitle ARCO to the desired remedy of reallocating its costs for the applicable period. Justice Souter made it clear that the grounds for *Beam* were narrow and confined entirely to an issue of choice of law, *i.e.*, whether to apply the old rule or the new rule. *Id.* at 2448. After a rule is found to apply retroactively, the separate issue arises of "whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* at 2443. While litigants are not to be distinguished for choice-of-law purposes on the equities of their claims, Justice Souter declared that "nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases." *Id.* at 2447-48. Although the liquor tax was declared unconstitutional in *Bacchus*, and that ruling was retroactively applied in *Beam*, the prevailing parties in each case were not automatically awarded the desired remedy of tax refunds. *Id.* at 2445, 2448. The cases were remanded for consideration of the remedial issues.

In this case the "new rule" was that the 1974 amendment to the regulations was invalid. As noted by this court in *Van Vranken* and the district court in the instant case, ARCO's cost allocations as submitted were legal and proper under the invalid regulation or the regulation as it existed prior to the amendment. Therefore, there is no *requirement* that the cost allocations be changed. The question then becomes whether ARCO has established sufficient good cause for DOE to grant special permission for the refiling. This determination is within the discretion of DOE. 10 C.F.R. § 212.126(d). OHA upheld DOE's denial based on this court's express holding in *Van Vranken*, *supra*, that the *Mobil* decisions do not require or permit ARCO to reallocate its costs. In its decision, OHA noted that the effect of the reallocation of costs would be to reduce ARCO's potential liability in the *Van Vranken* case. DOE Administrative Record at 551, 553. In its brief and at oral argument, ARCO likewise admitted that the only impact of the refilings would be in determining its potential liability in *Van Vranken*. Counsel for the DOE and the *Van Vranken* intervenors argued that reallocation at this time would effectively allow ARCO to change the prices it charged its customers in the 1970s. Thus, we echo the *Van Vranken* holdings in concluding that even if the "new rule" in the *Mobil* cases invalidating the 1974 amended regulation is applied to ARCO, its original cost allocations are valid and legal and ARCO is not required or permitted to change them at this late date. The equities of this particular case especially militate against affording ARCO any special remedy. This is consistent with other cases involving private actions under the price regulations which "uniformly hold that where the original cost allocation was permissible but not required, retroactive recalculation should not be allowed to offset overcharges which had arisen as a result of unrelated regulatory violations." *Chevron U.S.A., Inc. v. Dep't of Energy*, 944 F.2d 914, 917 (Temp. Emer. Ct. App. 1991) (citations omitted).

Thus, the OHA and district court correctly concluded that no good cause exists to allow ARCO's belated refiling.

ARCO also argued that DOE's lack of response to its 1982 refiling and DOE's acquiescence in the use of the unamended V factor in settlement negotiations with refiners misled ARCO into believing that there was no need to pursue the refiling request and therefore DOE is estopped from denying ARCO the use of the unamended V factor now. This argument is disingenuous. In an earlier case in which ARCO attempted to reallocate costs, *Eastern Airlines v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408 n. 14 (Temp. Emer. Ct. App.), *cert. denied*, 464 U.S. 915 (1983), this court specifically noted that reallocation required written permission from DOE and cited the refiling regulation at issue here. Thus, an experienced and sophisticated litigant like ARCO cannot credibly claim that it was misled by DOE's actions or that it was unaware that written permission was necessary.

ARCO also challenges OHA's alternative grounds for rejecting the application. Since we agree with the district court's determination that OHA had a rational basis for denying ARCO's application for lack of good cause, we need not discuss these additional challenges. Accordingly, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-465

Judge Flannery

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

DON VAN VRANKEN on behalf of himself and all others similarly situated, and SINCLAIR OIL CORPORATION,
Intervenor-Defendants.

ORDER

This matter comes before the Court upon plaintiff's motion for summary judgment and upon the cross-motions of defendants and intervenor-defendants for summary judgment. For the reasons stated in the accompanying Memorandum Opinion, it is by the Court this 20th day of August 1991

ORDERED that plaintiff's motion for summary judgment be, and it hereby is, denied; and it is further

ORDERED that defendants' and intervenor-defendants' cross-motions for summary judgment be, and they hereby are, granted.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 91-465

Judge Flannery

ATLANTIC RICHFIELD COMPANY,
Plaintiff,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Defendants,

and

DON VAN VRANKEN on behalf of himself and all others similarly situated, and SINCLAIR OIL CORPORATION,
Intervenor-Defendants.

MEMORANDUM OPINION

[Filed Aug. 20, 1991]

Plaintiff Atlantic Richfield Company ("ARCO") brings this action to set aside a ruling by the Office of Hearings and Appeals ("OHA") of the United States Department of Energy ("DOE"). ARCO's summary judgment motion is opposed by the government defendants and by intervenor-defendants the Van Vranken class and Sinclair Oil Corporation. As discussed below, the Court will uphold the decision of the OHA and deny ARCO's motion for summary judgment.

I. *Background*

A. The Regulatory Background

Between 1973 and 1981, the federal government regulated the prices of petroleum and petroleum products. Under the regulatory system, oil refiners could charge no more than a fixed maximum price for products subject to the regulations ("covered goods.") The regulations allowed, however, for refiners to incorporate increased production costs into the prices of their covered goods. The formula for allocating costs to price increases for each type of covered good was known as the "V factor," and it entailed dividing the total volume of a given covered good sold by the total volume of all covered goods sold. The resulting fraction was used to determine the amount of increased costs that could be attributed to each type of covered good. Refiners had the option of either increasing prices of covered goods or banking the increased costs to offset overcharges.[1]

Petroleum price controls were originally administered pursuant to the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 *et seq.* On April 30, 1974, however, the ESA lapsed and was replaced by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq.* The EPAA, and the accompanying DOE regulations, exempted certain formerly covered products from the mandatory price controls. The new regulations, however, failed to similarly subtract the increased production costs of the newly exempt goods from the denominator of the V factor. As a result, refiners could pass on increased costs of producing exempt goods in the prices charged for non-exempt, covered goods, as well as in the prices of the unregulated exempt goods.

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[1] Much of the background to this litigation is derived from *Van Vranken v. Atlantic Richfield Co.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989) and 699 F. Supp. 1420 (N.D. Cal. 1988).

Also on April 30, 1974, the DOE, in an attempt to remedy this situation, passed without notice or the opportunity for comment an emergency regulation ("the 1974 amendment") intended to prevent refiners from incorporating the costs of producing exempt goods into prices charged for covered goods. The 1974 amendment redefined the V factor to add the volume of exempt goods to the denominator of the V factor.[2]

Throughout the regulatory scheme, it was necessary for refiners to obtain DOE permission to allocate increased costs among the prices charged for covered goods. Permission was sought by filing with DOE a Refiner's Monthly Cost Allocation Report ("RMCAR" or "Report.") Following promulgation of the 1974 amendment, ARCO consistently filed RMCARs utilizing the amended V factor. In contrast, two other refiners challenged application of the 1974 amendment. One refiner, Getty, applied for and was granted administrative relief. Another refiner, Mobil, chose to challenge the validity of the 1974 amendment in federal court. In *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) (*Mobil I*), the Temporary Emergency Court of Appeals ("TECA") found the 1974 amendment to be invalid based upon the lack of notice and opportunity for comment. Later, in *Mobil Oil Corp. v. DOE*, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) (*Mobil II*), TECA permitted Mobil to reallocate its costs in accordance with the unamended V factor. DOE attempted to revive and retroactively implement the 1974 amendment in 1981, but this regulation was also struck down by TECA. *Mobil Oil Corp. v. DOE*, 678 F.2d 1083, 1090 (Temp. Emer. Ct. App. 1982) (*Mobil III*).

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[2] The V factor as redefined by the 1974 amendment will hereinafter be referred to as the "amended V factor." The original V factor prior to the 1974 amendment will be referred to as the "unamended V factor."

On three separate occasions in 1980 and 1981, ARCO requested permission from DOE to refile its previous RMCARS using the unamended V factor.[3] On all three occasions ARCO's requests were denied.[4] ARCO submitted a fourth request to resubmit its previous RMCARS on March 24, 1982. DOE never responded to this request. ARCO did not further pursue this latest request.

B. The *Van Vranken* Litigation and Subsequent Events

In 1979, Don Van Vranken, on behalf of a nationwide class of petroleum product resellers, brought an action against ARCO in the Northern District of California alleging that ARCO had overcharged resellers for covered goods purchased between 1974 and 1982.[5] On April 4, 1988, ARCO moved for summary judgment on the ground that the *Mobil* decisions allowed it to retroactively reallocate its costs without reference to the invalidated

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[3] DOE regulations, discussed *infra*, allow refiners to request leave to refile previously submitted RMCARs. *See* 10 C.F.R. § 212.126(d).

[4] ARCO maintains that its 1980 and 1981 requests for refiling were rejected because DOE considered them to be premature in light of the ongoing *Mobil* litigation. The Van Vranken class disputes this characterization of DOE's actions. An examination of the administrative record in this matter reveals that DOE took the position in all three denials that refiners were required to comply with the amended V factor pending ultimate resolution of the *Mobil* litigation. Administrative Record ("R.") at 98-112. In the interim, the regulations implementing the amended V factor were considered by DOE to be "valid and enforceable." R. at 101, 105; *see* R. at 112.

[5] Sinclair Oil Corporation, one of the original members of the Van Vranken class, opted out of the class action and brought a separate complaint against ARCO, which was later consolidated with the *Van Vranken* litigation.

Both the Van Vranken class and Sinclair Oil have joined as intervenor-defendants in the present action. At oral argument, counsel for Sinclair represented that Sinclair had reached a settlement with ARCO, and argument on behalf on the intervenor-defendants was presented by counsel for the Van Vranken class.

amended V factor. *Van Vranken v. Atlantic Richfield Co.*, 699 F. Supp. 1420, 1421-22 (N.D. Cal. 1988). The practical result of such reallocation would have been to allow ARCO to retroactively increase its costs and thereby increase its banks to offset any overcharge liability. *Id.* The District Court rejected ARCO's contentions and held that the *Mobil* trilogy did not provide authorization for non-party refiners to automatically reallocate past production costs. *Id.* at 1424.

The District Court decision was upheld by TECA in *Van Vranken v. Atlantic Richfield Co.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989), *cert. denied*, 110 S. Ct. 1298 (1990). TECA rejected ARCO's arguments that the *Mobil* decisions provided authority for retroactive reallocation of its costs. First, TECA held that the *Mobil* decisions did not require reallocation. *Id.* at 423. TECA noted that "neither *Mobil I* nor *Mobil II required* Mobil to retroactively reallocate costs," and that "nothing in the regulations required that costs for exempt goods be attributed to covered goods when calculating the maximum allowable price for covered goods." *Id.* Retroactive reallocation would be required, TECA held, if ARCO's previous cost allocations had been unlawful. *Id.* But because it was not unlawful for ARCO to have priced its covered goods *below* the fixed maximum price, as it had done by utilizing the amended V factor formula, ARCO was not required to retroactively reallocate its costs. *Id.*

Second, TECA rejected ARCO's argument that the *Mobil* decisions permitted it to reallocate its costs. TECA found that the invalidation of the 1974 amendment by the *Mobil* courts did not excuse ARCO from compliance with DOE regulations relating to resubmission of RMCARs, and that those regulations conditioned resubmission upon written permission from DOE. *See id.* at 424. The Court concluded that "ARCO sought, but did not obtain, permission from the DOE to retroactively reallocate costs. . . . ARCO's failure to obtain permission

from the DOE precludes it from any relief by this court." *Id.* (footnote omitted).[6] TECA also held that ARCO waived its right to relief by not challenging the regulations implementing the amended V factor in a timely manner, as had Mobil and Getty. *Id.* at 424-25.

Seizing upon language in TECA's decision suggesting that retroactive cost allocation could only be accomplished with DOE permission, ARCO filed an application with DOE to resubmit its RMCARs on December 12, 1989. Administrative Record ("R.") at 38. Again, DOE never responded to ARCO's request. In contrast to its actions following its March 1982 request, ARCO decided to treat DOE's silence as a denial of its application and appealed to the OHA. R. at 1. On February 1, 1991, OHA upheld DOE's constructive denial of ARCO's request, R. at 549-75, prompting ARCO to bring the present action challenging the OHA decision.

II. *Standard of Review*

The scope of review to be exercised by the Court is limited. *Thriftway Co. v. DOE*, 867 F.2d 1577, 1580 (Temp. Emer. Ct. App. 1989) (citing *City of Long Beach v. DOE*, 754 F.2d 379, 385 (Temp. Emer. Ct. App. 1985)). "Congress having authorized administrative control in the DOE, the judicial role requires approval of the DOE's decision if there is a rational basis for it." *Id.* The limited scope of review is reflected in the standard of review set forth in the EPAA and ESA:

> [N]o order of [DOE] shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's

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[6] In the footnote accompanying this passage from *Van Vranken*, TECA noted that "[i]f Arco thought the DOE erred in not granting the company permission to retroactively reallocate its costs, ARCO could presumably have brought an action appealing the DOE's decision." 890 F.2d at 424 n.2.

> authority, or is based upon findings which are not supported by substantial evidence.

ESA, 12 U.S.C. § 1904 note, incorporated by reference into the EPAA, 15 U.S.C. § 754(a)(1); *see Thriftway*, 867 F.2d at 1580. The Court must give "great deference" to DOE's interpretation of its regulations based upon its recognized expertise and upon the difficulty of judicial administration of complex programs dealing with the petroleum industry. 867 F.2d at 1580-81.

ARCO argues that OHA's decision in this matter was procedural and that procedural decisions are entitled to less deference than substantive decisions. The Court is not persuaded by ARCO's argument. ARCO analogizes OHA's decision to that in *Amoco Corp. v. DOE*, 912 F.2d 472 (Temp. Emer. Ct. App. 1990), in which the OHA held that an application for a refund of overcharges for petroleum products was untimely and was subject to dismissal under DOE regulations. *Id.* at 477. Unlike the decision in *Amoco*, the decision of the OHA in this case cannot clearly be characterized as a procedural decision.[7] The standard of review having been set out by the statutes creating the federal petroleum price control scheme, the Court finds no reason to adopt a different standard of review based upon the facts of this case.

III. *The OHA Decision and ARCO's Challenges*

ARCO brings several challenges to the OHA decision. ARCO contends that OHA's decision was based upon a clear error of judgment and was not supported by evidence in the record. ARCO also claims that DOE is estopped from denying its application to reallocate costs.

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[7] The Court also notes that although TECA in *Amoco* states that courts may exercise more independent judgment when reviewing DOE procedural decisions, it ultimately holds that such decisions are to be reviewed under the traditional "arbitrary and capricious" and "abuse of discretion" standards, which accord substantial deference to the OHA. *See* 912 F.2d at 475.

A. Good Cause

DOE regulations provide that "DOE will routinely accept submissions or refiling of [cost allocation] reports only within one year after the original filing or submission." 10 C.F.R. § 212.126(d)(1). However,

> [n]otwithstanding the provisions of paragraph (d)(1) of this section, a refiner may resubmit or refile reports until June 1, 1979, for months of measurement beginning with September 1973; where expressly authorized by DOE regulation or order; *or where DOE grants written permission to resubmit or refile for good cause shown.*

Id. § 212.126(d)(2) (emphasis added). In its February 1, 1991 decision, OHA found that ARCO had not established good cause to resubmit its RMCARs. ARCO argues that this finding was a clear error of judgment and must be set aside.

First, ARCO argues that the invalidation of the amended V factor by the *Mobil* decisions created good cause for refiling. To hold otherwise, ARCO contends, would permit refiners to file RMCARs which utilize an illegal cost allocation formula. As OHA correctly noted, however, this argument was previously raised and rejected by TECA in *Van Vranken*. R. at 566. *Van Vranken* expressly held that the *Mobil* decisions did not require or permit ARCO to reallocate its costs. 890 F.2d at 423-24. TECA further held that resubmission would be required only if past cost allocations were illegally in excess of the price ceiling, which ARCO's RMCARS were not. *Id.* at 423. The OHA thus correctly concluded that the *Mobil* decisions, standing alone, did not create good cause for the refiling of ARCO's cost allocation reports.

Second, ARCO argues that OHA improperly interpreted *Van Vranken* to hold that OHA "should accord no weight to the *Mobil* decisions in determining whether 'good cause' exists for the refiling which ARCO seeks." R. at 566. It

is unclear what OHA meant when it stated that it would give "no weight" to the *Mobil* decisions. Obviously, the *Van Vranken* opinions and ARCO's application for cost reallocation found their bases in the *Mobil* trilogy, so it cannot be said that the *Mobil* litigation could be completely ignored by OHA. Rather, the Court finds that OHA's use of the phrase "no weight" simply implies what *Van Vranken* and the OHA correctly held—that the *Mobil* decisions did not establish *per se* good cause for refiners to resubmit cost allocation reports. Although ARCO would have the Court make a greater issue out of OHA's use of the phrase "no weight," implying that OHA had called into question the continued validity of the *Mobil* decisions, the Court finds instead that OHA has properly interpreted and applied the *Mobil* decisions in accordance with the opinion of TECA in *Van Vranken.*[8]

Third, ARCO contends that OHA committed a clear error of judgment by mailing to accord weight to DOE's acquiescence to use of the unamended V factor after the *Mobil III* decision. ARCO contends that following *Mobil III*, DOE began using the unamended V factor in settlement negotiations with refiners. These negotiations were intended to resolve all enforcement matters between DOE and petroleum refiners. Settlement of enforcement matters between DOE and ARCO was ultimately resolved by a Consent Order entered into March 1, 1985. *See* 50 Fed. Reg. 8366 (Mar. 1, 1985). ARCO claims that DOE's use of the unamended V factor in settlement negotiations and the Consent Order led it to believe that DOE had accepted use of the pre-1974 factors for all purposes and that re-

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[8] The Court also notes that TECA found ARCO to have waived its right to relief by not challenging the amended V factor in a timely manner. *Van Vranken,* 890 F.2d at 424. Assuming that OHA gave no weight to the *Mobil* decisions, OHA's actions were not necessarily in error in light of the language from *Van Vranken,* which suggests that ARCO was not at liberty to take advantage of the invalidation of the amended V factor by the *Mobil* decisions.

submission of corrected RMCARs was rendered unnecessary.

OHA, however, reached a different conclusion as to the effect of the DOE enforcement decisions on ARCO's ability to retroactively reallocate costs. OHA characterized DOE's use of the unamended V factors as "only a point of compromise to move settlement negotiations forward." R. at 569. OHA also found that DOE's "settlement practices and the policy objectives of the refiling regulations are completely separate." *Id.* OHA concluded that DOE's settlement position did not excuse ARCO from compliance with formal refiling procedures, which required written permission from DOE prior to reallocation of costs. *Id.* OHA found support for this conclusion in the *Van Vranken* decision, which held that "[n]othing in the invalidation of the 1974 amendment had any effect on the refiling regulations and nothing in the refiling regulations excepts refiners from compliance when an allocation regulation is invalidated." 890 F.2d at 424.

ARCO disputes OHA's finding that DOE's use of the unamended V factor was a mere "point of compromise." It also disputes that compliance with refiling regulations was necessary following invalidation of the 1974 amendment. The Court, however, is not free to replace OHA's conclusions with its own if the OHA decision had a rational basis. The Court finds that OHA's decision did have a rational basis. OHA properly interpreted and applied the holding of *Van Vranken* and the published DOE regulations. The Court finds that OHA's decision was not a clear error of judgment and it will uphold OHA's finding that no good cause existed for ARCO to reallocate its costs based upon DOE's alleged acquiescence to use of the pre-1974 V factor.

B. Due Care and Diligence

OHA's denial of ARCO's request to refile based upon lack of good cause effectively disposed of ARCO's application. The Court has found OHA's ruling to have a rational

basis and upholds that portion of OHA's decision. OHA also denied ARCO's application on alternative grounds, which the Court also finds to have a rational basis. DOE regulations provide that

> [i]n any application for permission to resubmit or refile a report pursuant to paragraph (d)(2) of this section, DOE will not make a finding of good cause routinely. *Where it appears that such a finding may adversely affect the interest of the consuming public,* a firm must demonstrate in its application, at a minimum, that *the claimed errors or omissions* in the report or reports which the firm seeks to replace or modify *did not result from a failure to exercise due care and diligence.*

10 C.F.R. § 212.126(d)(3) (emphasis added). OHA found that ARCO failed to establish that it had exercised due care and diligence in filing its RMCARs. Specifically, OHA found that ARCO had failed to appeal the 1982 rejection of its application to refile its RMCARs and that, although the Van Vranken litigation had been pending since 1979, ARCO did not diligently pursue formal approval for its amended RMCARs until the present appeal to OHA.

ARCO argues that OHA's invocation of the "due care and diligence" requirement to reject its application was erroneous. First, ARCO claims that § 212.126(d)(3) applies only when there may be an adverse effect on the interest of the consuming public. Because the Van Vranken class consists of resellers, not consumers, ARCO argues that the "due care and diligence" requirement is not applicable to this case.

This same argument was raised in the proceedings below and rejected by OHA. OHA noted that due care and diligence requirement is invoked when the desired cost reallocation "may" adversely affect the interest of the consuming public. Because this interest is defined neither

by statute nor by regulation, OHA was forced to determine whether reallocation of costs by ARCO would cause the type of adverse effect proscribed by § 212.126(d)(3). OHA concluded "that the phrase 'interest of the consuming public' should be broadly construed to embrace the policy objectives of the EPAA, pursuant to which the regulation was promulgated." R. at 572. OHA noted that one of these policy objectives is "equitable distribution of . . . refined petroleum products at equitable prices among all . . . sectors of the petroleum industry." *Id.* (quoting 15 U.S.C. § 753(b)(1)(F)). OHA found that the interest of the consuming public was broad enough to encompass the interest of petroleum resellers in avoiding overcharges for petroleum products purchased. Because ARCO's request to reallocate costs would frustrate the resellers ability to recover overcharges, OHA found that the "due care and diligence" requirement of § 212.126(d)(3) should apply to ARCO's application for resubmission of its RMCARs.

Once again, the Court encounters a situation in which it must properly grant deference to the OHA's decision. Deference is especially appropriate in this instance, in which the agency charged by Congress to administer a statutory scheme has interpreted the statute and its accompanying regulations in light of their underlying policies and enforcement objectives. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). OHA's interpretation and application of DOE regulations must be accorded substantial deference by the Court in recognition of OHA's recognized expertise in administration of the petroleum price control program. *See Thriftway*, 867 F.2d at 1580; *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 690, 694-95 (Temp. Emer. Ct. App. 1981); *cf. MGPC, Inc. v. DOE*, 763 F.2d 422, 430-31 (Temp. Emer. Ct. App.), *cert. denied*, 474 U.S. 823 (1985). The Court finds that OHA's interpretation of § 212.126(d)(3) has a rational basis,

and the Court cannot substitute its own interpretation of the regulatory provision for that of OHA. Thus, the Court upholds OHA's ruling that § 212.126(d)(3)'s due care and diligence requirement applies to ARCO's request for resubmission.

Second, ARCO contends that if the due care and diligence requirement is applicable, ARCO has fulfilled it. ARCO argues that its desire to amend its RMCARs resulted from a change in the law brought about by the *Mobil* decisions and not from a lack of due care or diligence. ARCO again argues that DOE's acceptance of its unamended V factors in the Consent Order led ARCO to believe that formal refiling and acceptance of its RMCARs was unnecessary. ARCO contends that DOE's post-*Mobil III* conduct led it to conclude that an appeal from its March 1982 reallocation request was not required.

The Court agrees with OHA's finding that ARCO did not exercise due care and diligence in seeking approval for its retroactive cost reallocation. ARCO obviously was aware of its obligation to secure DOE approval prior to reallocating its costs, as evidenced by its repeated attempts to gain such approval in 1980 and 1981. ARCO can point to no circumstances which would justifiably lead it conclude that compliance with published DOE regulations was no longer necessary. Although ARCO places great reliance upon its Consent Order with DOE, that Order was not entered until 1985 and did not purport to affect rights and liabilities under the private enforcement mechanisms of the ESA and the EPAA nor to supersede DOE cost reallocation regulations.[9] The *Van*

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[9] The 1985 agreement provided that "this Consent Order settles and finally resolves all aspects of ARCO's liability, if any, *to DOE* under the Federal Petroleum Price and Allocation Regulations . . ." Consent Order ¶ 502(b), *reprinted at* 50 Fed. Reg. 8366, 8373 (Mar. 1, 1985) (emphasis added). The Consent Order further provided that

Vranken litigation commenced in 1979, prior to the Consent Order and prior to the *Mobil II* and *Mobil III* decisions. Significantly, in 1983 ARCO was party to a case in which TECA decided that DOE regulations prevented retroactive reallocation of costs without written approval from DOE. *Eastern Air Lines, Inc. v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408-09 (Temp. Emer. Ct. App.), *cert. denied*, 464 U.S. 915 (1983). In light of this sequence of events, the failure of ARCO to receive formal reallocation approval as required by DOE regulations, and the holding in *Eastern Air Lines*, ARCO cannot credibly argue that it was misled into believing that it was not required to obtain written approval from DOE prior to reallocating its costs. OHA's finding that DOE failed to exercise due care and diligence by neglecting to appeal DOE's failure to respond to its March 1982 reallocation application is rational and supported by the evidence. The Court agrees with OHA's finding and will not set it aside.

C. Evidence in the Record

ARCO argues that the OHA decision must be set aside because OHA made at least three findings that are unsupported by the evidence in the record. First, ARCO claims that OHA's finding that DOE had not acquiesced to ARCO's use of the unamended V factor was based upon assertions of counsel at oral argument and not upon evidence in the record. Second, ARCO claims that OHA's finding that ARCO's refiling of its RMCAR may affect the consuming public was not based upon any evidence.

> [n]othing contained herein may be construed as a bar, an estoppel, or a defense against any criminal action, or against any civil action brought by any purchaser of covered products from ARCO, . . . [T]his Consent Order does not affect or prejudice any private action brought by a third party against ARCO, or by ARCO, against any third parties, including an action for contribution.

Id. ¶ 502(c).

Third, ARCO argues that OHA had no basis upon which to conclude that ARCO should have foreseen the need to gain formal DOE acceptance of its amended RMCARs rather than merely relying upon DOE's perceived acquiescence to the use of the unamended V factor.

ARCO's two latter arguments raise issues previously addressed by the Court and will not be dealt with at length again. The Court has discussed OHA's responsibility to interpret provisions of DOE regulations and the evidence showing that ARCO could not justifiably have concluded that formal DOE approval was not required prior to cost reallocation. The Court also notes that OHA's findings as to how best to protect the interests of the consuming public is not purely a factual question, but rather it involves questions of interpretation of DOE regulations and enforcement policies. Although the Court finds a rational basis for OHA's conclusion that the interests of the consuming public are implicated by the facts of this case, the Court also finds it to be improper to review OHA's decision upon the "unsupported by evidence" standard urged by ARCO.

Although the Court has not expressly addressed ARCO's first contention, it has previously set forth the evidence showing that ARCO was or should have been aware of its obligation to secure written DOE permission to refile its cost allocation reports. Based upon the presence of objective evidence in the record, the Court finds ARCO's claim that OHA relied solely upon the statements of counsel at oral argument to be without merit.

D. Estoppel

ARCO argues that DOE is estopped from denying ARCO permission to amend its RMCARs based upon its conduct indicating acquiescence to use of the unamended V factors. ARCO claims that following *Mobil III*, DOE followed a general practice of allowing refiners to claim

increased costs based upon the unamended V factors. ARCO also contends that DOE used the unamended V factor in reaching its Consent Order with ARCO. ARCO claimed that it relied to its detriment upon DOE's conduct, which it claims led it to believe that the unamended V factor would be acceptable for all purposes.

Again, the Court has previously addressed the issues raised by ARCO's allegations. As previously noted, the Court finds that ARCO had reason to know that it had to comply with the published DOE regulations and obtain written DOE permission to reallocate costs, and that the actions of DOE following *Mobil III* and during settlement negotiations did not relieve ARCO of those preexisting obligations. The Court finds that ARCO's reliance upon DOE's conduct was unwarranted, and it does not find that DOE is estopped from denying DOE's request for reallocation.

IV. *Conclusion*

For the foregoing reasons, the Court will deny ARCO's motion for summary judgment and grant the cross-motions of the defendants and intervenor-defendants for summary judgment. An appropriate Order accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX D

[DOE SEAL]

DEPARTMENT OF ENERGY
Washington, DC 20585

Feb. 1, 1991

DECISION AND ORDER OF
THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Atlantic Richfield Company
Date of Filing:	April 16, 1990
Case Number:	LEA-0001

On April 16, 1990, the Atlantic Richfield Company (ARCO) filed an Appeal with the Office of Hearings and Appeals (OHA) of the Department of Energy (DOE), in which it contests the denial by the Economic Regulatory Administration (ERA) of an Application to Refile Refiner's Monthly Cost Allocation Reports (Application to Refile) submitted by ARCO on December 12, 1989. In the Application which it submitted under 10 C.F.R. § 212.126(d), ARCO requests permission to refile its Refiner's Monthly Cost Allocation Reports (RMCAR's) for the months August 1973 through December 1975 (the refiling period). The Application to Refile was denied by the ERA, *sub silentio*.[1] If the present Appeal were

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[1] The refiling regulations provide that "[the ERA] will dispose of each application in writing, with a concise statement of the reasons for granting or denying the application [and t]he disposition of such an application shall be subject to appeal as an order under Subpart H of Part 205." 10 C.F.R. § 212.126(d)(3). While the ERA did not issue a written determination, ARCO submits that its

granted, the ERA would be required to accept the revised RMCAR's submitted in ARCO's Application to Refile.

I. *Background*

A. The Regulations

During the refiling period, ARCO was a "refiner" as that term was defined in 10 C.F.R. § 212.31, and therefore subject to the provisions of the refiner price rule, 10 C.F.R. § 212.83. In general, section 212.83 provided that a refiner could not charge a price for a covered product that exceeded the weighted average price at which the product was sold in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs and non-product costs incurred since May 1973. *See* 39 Fed. Reg. 1924 (January 15, 1974). Relevant to the present proceeding, the regulations established a formula for determining the fraction of a refiner's increased crude oil costs that could be attributed to a given covered product and recovered in its price. This calculation, known as the "V factor," generally entailed taking the total volume of the covered product sold and dividing it by the total volume of all covered products sold. *See* 10 C.F.R. § 212.83 (c) (2).

ARCO was also subject to certain of the reporting requirements set forth in 10 C.F.R. Part 212, Subpart I. Under these provisions, ARCO was required to submit RMCAR's to the DOE on a monthly basis. *See* 10 C.F.R. § 212.126(b). These reports generally provided the means by which refiners computed, reported and adjusted their May 15, 1973, selling prices for covered products. Appli-

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Application to Refile was governed by the provisions of 10 C.F.R. Part 205, Subpart G. Section 205.96 of that subpart provides that "[i]f the DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided under this subpart."

cations to resubmit or refile RMCAR's are governed by 10 C.F.R. § 212.126(d). Pertinent to the present case, sections 212.126(d)(2) and (d)(3) provide:

> (2) *Exceptions.* Notwithstanding the provisions of subparagraph (d)(1) of this section, a refiner may resubmit or refile reports until June 1, 1979, for months of measurement beginning with September 1973, where expressly authorized by DOE regulation or order; or where DOE grants written permission to resubmit or refile *for good cause shown.*
>
> (3) *Applications to resubmit or refile.* In any application for permission to resubmit or refile a report pursuant to subparagraph (d)(2), *DOE will not make a finding of good cause routinely.* Where it appears that such finding may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify *did not result from a failure to exercise due care and diligence.* Firms must apply for permission pursuant to subparagraph (d)(2), in writing, to the [ERA]. Applications to resubmit or refile must be accompanied by a written statement completely describing the proposed adjustments and the reasons therefor, and a numerical schedule which reflects both the previously submitted figures and the proposed adjusted figures. The [ERA] will dispose of each application in writing, with a concise statement of the reasons for granting or denying the application. The disposition of such an application shall be subject to appeal as an order under Subpart H of Part 205.

(emphasis supplied); *see* 44 Fed. Reg. 14534 (1979). *See also Standard Oil Company of Ohio,* 9 DOE ¶ 80,101 (1981).

B. ARCO's Application to Refile

In its Application to Refile, ARCO sought permission to refile its RMCAR's for the months August 1973 through December 1975, for the purpose of adjusting its "V factor" cost allocation fractions. This would reduce ARCO's potential liability in the *Van Vranken* private overcharge litigation, a case currently pending before the United States District Court for the Northern District of California, which involves a claim brought by a class of plaintiffs under section 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 note. *Van Vranken v. Atlantic Richfield Co.*, C-79-0627-SW (N.D. Cal.). ARCO argued in its Application to Refile that "good cause" exists for the ERA's acceptance of these revised RMCAR's under 10 C.F.R. § 212.126(d)(2), on three bases: (i) in order to bring its V factors in conformity with certain decisions of the Temporary Emergency Court of Appeals (TECA), referred to as the *Mobil* trilogy[2]; (ii) DOE has already accepted ARCO's V factors adjusted in accordance with the *Mobil* decisions; and, (iii) ARCO's refiling is necessitated by TECA's decision in *Van Vranken, et al. v. Atlantic Richfield Co.*, 890 F.2d 421 (Temp. Emer. Ct. App. 1989) (*Van Vranken*), in which, according to ARCO, TECA held that ARCO cannot use its corrected V factors to reduce its liability for overcharges in private litigation unless ARCO first obtains permission from the DOE in the context of a formal refiling under 10 C.F.R. § 212.126(d). *See* Application to Refile at 2-5. These bases for ARCO's Application to Refile are discussed briefly below.

The *Mobil* trilogy emanated from an emergency regulatory amendment redefining the V factor which the Fed-

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[2] Mobil Oil Corp. v. Department of Energy, 610 F.2d 796 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) (*Mobil I*); Mobil Oil Corp. v. Department of Energy, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) (*Mobil II*); Mobil Oil Corp. v. Department of Energy, 678 F.2d 1083 (Temp. Emer. Ct. App. 1982) (*Mobil III*).

eral Energy Administration, predecessor of the DOE, adopted on April 30, 1974. 39 Fed. Reg. 15139 (May 1, 1974). This V factor amendment was intended to correct an incongruity which had developed in the regulations whereby, under the V factor formula, a greater than proportionate amount of increased crude oil costs could be passed through on each covered product.[3] The V factor amendment was challenged in a suit brought by Mobil Oil Corporation (Mobil). In *Mobil I*, TECA sustained Mobil's contention that the 1974 amendment was invalid because DOE had failed to provide a period of notice and comment. Later, in *Mobil II*, TECA affirmed its determination in *Mobil I* and permitted Mobil to reallocate crude oil costs it incurred producing exempt products to the cost of producing covered products. Finally, in *Mobil III*, TECA rejected the agency's attempt in a January 1981 rulemaking (46 Fed. Reg. 7776 (1981)) to repromulgate retroactively to April 30, 1974, the regulation held invalid in *Mobil I*. TECA ruled, however, that the DOE could enforce the revised V factor regulations prospectively effective February 1, 1976. Although ARCO neither joined the *Mobil* litigation as a party nor requested DOE to grant it adminis-

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[3] The price control regulations that were initially administered in 1973, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. § 1904, *et seq.* (ESA), covered all refined petroleum products. However, the price regulations that were continued under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. § 751, *et seq.* (EPAA), enacted in November 1973, did not cover certain petroleum products previously regulated under the ESA, *e.g.*, petroleum wax, petroleum coke and asphalt. The definition of "covered products" in the recodified EPAA regulations was modified to exclude these products, 39 Fed. Reg. 12353 (1974), but the agency inadvertently neglected to modify the V factor formulas accordingly. This resulted in the disproportionate passthrough of *all* crude oil cost increases on the reduced scope of "covered products" subject to price controls. The emergency V factor amendment was adopted on April 30, 1974, without notice and comment, to rectify this anomaly.

trative relief from the V factor amendment when the matter first arose, the firm maintained that the ERA should still accept its revised RMCAR's for the period August 1973 through December 1975. The adjusted V factors set forth in its revised RMCAR's would result in ARCO's reallocation of crude oil costs attributable to exempt products to the cost of producing covered products for that period, and thereby increase its maximum allowable prices for these covered products and reduce its potential private overcharge liability.

ARCO argues that, by its actions and statements, the DOE has acknowledged that the *Mobil* decisions provide "good cause" for permitting ARCO to adjust its V factors. ARCO asserted that following *Mobil III*, the ERA permitted refiners including ARCO to use V factors adjusted in accordance with *Mobil* for the period prior to February 1976. In this regard, the record indicates that in June 1985, the DOE and ARCO executed a final Consent Order (10 C.F.R. § 205.199J) which resolved all DOE price control compliance matters with respect to ARCO, with limited exceptions. 50 Fed. Reg. 26603 (1985); *see also* 50 Fed. Reg. 8366 (1985) (proposed Consent Order). ARCO asserted that in the settlement negotiations from 1982 to 1985, which led to the Consent Order, the ERA determined ARCO's allowable costs using the *Mobil* V factor calculations and indeed never questioned ARCO's revised V factors.[4] *See* Application to

[4] ARCO's Application to Refile asserted that the final RMCAR's accepted by DOE were contained in a submission made on May 30, 1979 (the "1979 Restatement"), in which the firm refiled all of its previously submitted RMCAR's pursuant to 10 C.F.R. § 212.126 (d)(2). *See* Application to Refile at 4 n.4. The 1979 Restatement incorporated V factor fractions calculated pursuant to the April 30, 1974 V factor amendment which at that time was controlling as it had not been declared invalid by TECA. As discussed later in this decision, ARCO attempted to refile its RMCAR's to revise its V factors in wake of the *Mobil* decisions on four instances prior to entering settlement negotiations with DOE in 1982. The ERA did not formally accept any of these refilings. Nonetheless, for pur-

Refile at 10-11. ARCO further asserted that this was consistent with agency policy regarding settlement negotiations at that time.[5]

Finally, ARCO maintained that "good cause" exists for the acceptance of its present refiling as a result of TECA's ruling in *Van Vranken, supra.* In September 1988, the District Court issued a decision in which it determined, *inter alia,* that ARCO was prohibited from performing a retroactive reapportionment of V factor costs on the basis of TECA's *Mobil* decisions. *Van Vranken v. Atlantic Richfield Co.,* 699 F. Supp. 1420 (N.D. Cal. 1988). ARCO brought an interlocutory appeal contesting that ruling.

In October 1989, TECA affirmed that District Court decision, noting that ARCO had previously "sought, but did not obtain, permission from the DOE to retroactively reallocate costs" under 10 C.F.R. § 212.126(d)(2), and that "ARCO's failure to obtain permission from the DOE precludes it from any relief by this court." 890 F.2d at 424 (footnote omitted). TECA explained further that ARCO could have avoided the formal refiling of RMCAR's if it had timely challenged the 1974 amendment as Mobil did, but "[h]aving failed to do so, ARCO cannot avoid the clear language of the regulation requiring permission from the DOE before reallocating costs." *Id.* In this regard, TECA held further that ARCO had waived

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poses of settlement negotiations, the ERA utilized ARCO's revision of the 1979 Restatement adjusting the firm's V factors in accordance with the unamended V factor formula.

[5] ARCO included with its Application to Refile the Affidavit of Rayburn Hanzlik, Administrator of the ERA from October 1981 through September 1985. Mr. Hanzlik states, *inter alia,* that after the issuance of *Mobil III,* DOE abided by TECA's decisions and that for purposes of estimating overcharge liability in settlement negotiations, all refiners were permitted to calculate their V factor fractions in acoordance with the unamended V factor rule. Application to Refile Exhibit D, Affidavit of Rayburn Hanzlik ¶¶ 5 and 7.

its right to challenge the 1974 V factor amendment by not timely challenging the regulation or seeking other administrative relief, as had Mobil and Getty Oil Company. *See id.* at 424-25.

ARCO contended in its Application to Refile that in *Van Vranken*, TECA held for the first time that a refiner cannot use V factors adjusted to conform with the *Mobil* decisions for purposes of defending itself against private claims unless it first obtains permission from DOE to refile its RMCAR's under 10 C.F.R. § 212.126 (d)(2). Thus ARCO claimed that until *Van Vranken*, it had no reason to press DOE for permission to revise its V factors in conformance with the *Mobil* decisions. *See* Application to Refile at 12-13. ARCO maintained that now as a result of TECA's ruling, "good cause" exists for the acceptance of its refiled RMCAR's.

In addition, ARCO claimed that it otherwise satisfies the refiling conditions of 10 C.F.R. § 212.126(d)(3). ARCO contended that granting its Application to Refile would not "adversely affect the interest of the consuming public" because in the *Mobil* cases TECA has ruled that the public interest warrants invalidation of the amended V factor. Application to Refile at 14. ARCO further asserted that there would be no adverse affect to the public interest since DOE price controls have ended, and that in reaching the Consent Order agreement with ARCO "DOE has already fulfilled its duty to safeguard the public interest and it has discharged its responsibility to provide full restitution to the consuming public." *Id.* at 16.

ARCO maintained that, in any event, it easily satisfies the alternative prerequisite of section 212.126(3), *viz.*, "that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify did not result from a failure to exercise due care and diligence." ARCO asserted that when it submitted the 1979 Restatement, its last official RMCAR refiling for the period concerned, the *Mobil* litigation was not finally resolved and

the firm was therefore bound by the amended V factor regulation. ARCO asserted that following the issuance of *Mobil I*, it attempted to refile its RMCAR's on four instances: in March 1980, April 1980, August 1981, and March 1982. *See* Application to Refile at 17-19. The first three of these attempted refilings were rejected by the ERA in letter determinations: the first, on the grounds that a petition filed by DOE for a Writ of Certiorari to the Supreme Court for review of the *Mobil I* decision was yet pending; the second, because TECA had remanded *Mobil I* to the district court for further findings and DOE reserved the right to exhaust further appeals; and, the third, because TECA had not yet issued its decision in *Mobil III* regarding the agency's attempt in the January 1981 rulemaking to retroactively repromulgate the V factor amendment. *See id.* Exhibits H-L. ARCO asserted that it received no formal response with regard to the March 1982 refiling but that the ERA acquiesced in the use of revised V factors in the context of the settlement negotiations which began soon after. Not until the *Van Vranken* decision, claimed ARCO, did it have reason to again seek permission to use revised V factors.

Finally, ARCO argued that nothing in the 1985 Consent Order which the firm executed with DOE bars its Application to Refile. According to ARCO, ¶ 502 of the Consent Order released DOE from all future "claims" by ARCO relating to the subject matter of the settlement. ARCO maintained that the term "claims" used in the Consent Order does not encompass an "application" such as the present one. *See* Application to Refile at 22-23. ARCO asserted that, moreover, the Consent Order by its terms was intended to resolve enforcement matters between ARCO and DOE, not to affect private enforcement litigation. *Id.* at 25-26. In that regard, ARCO noted that ¶ 502(c) provides that the Consent Order cannot be used to "affect or prejudice" any private enforcement action brought by a third-party against ARCO.

C. ARCO's Appeal

In its Appeal, ARCO restates all the bases for its Application to Refile. Thus ARCO contends that: (i) the ERA's denial of ARCO's Application was erroneous because ARCO's Application satisfies the "good cause" criterion of 10 C.F.R. § 212.126(d)(2); (ii) the ERA's action was arbitrary and capricious because the ERA failed to articulate any factual or legal basis for its denial (see note 1, *infra*); and, (iii) the ERA's denial was arbitrary, capricious, and erroneous because no valid reasons existed for denying ARCO's Application. *See* Appeal at 4.

On May 21, 1990, the ERA filed Comments in Response to ARCO's Appeal (ERA Comments), in which it argues that ARCO's Appeal should be dismissed. The ERA principally contends that: (i) ARCO's failure to appeal the ERA's prior denials of ARCO's refiling requests under 10 C.F.R. Part 205, Subpart H, bars the present relief which ARCO seeks; (ii) ARCO's Application to Refile and Appeal are barred under the doctrine of laches by reason of ARCO's inexcusable delay in seeking to revise its V factor allocations, and the resulting prejudice to DOE; (iii) ARCO's Application to Refile is barred by the Consent Order which, with certain specified exceptions, resolved all matters relating to ARCO's compliance with the federal price and allocation regulations; and, (iv) even on the merits, ARCO has failed to establish "good cause" for its refiling under 10 C.F.R. § 212.126 (d)(2). With regard to the latter contention, the ERA argues that the primary purpose of the form filing regulations was to ensure industry compliance with the DOE price regulations, and thus in view of the Consent Order resolving all compliance matters with ARCO, no "good cause" exists to accept ARCO's Application to Refile. *See* ERA Comments at 10-11. In addition, the ERA asserts that neither the *Mobil* trilogy nor the *Van Vranken* decision constitute "good cause" to accept ARCO's re-

filing, and that in any event, ARCO has failed to satisfy the "due care and diligence" prerequisite of section 212.126 (d)(3). The ERA's contentions are examined in greater detail below.[6]

The ERA's Comments opposing ARCO's Application to Refile and Appeal, and in particular the ERA's procedural challenges, spawned additional exchanges of pleadings by the parties. On June 22, 1990, ARCO filed a Response to Comments (ARCO Response) in which the firm challenges the ERA's contention that the Application to Refile is barred, and restates its position that "good cause" exists for the Application to Refile. ARCO further requested in its Response that an evidentiary hearing be convened, entailing examination of witnesses, with respect to purported factual disputes raised by the ERA's Comments. On July 13, 1990, the ERA filed a Response to ARCO's Supplemental Request for Hearing, opposing the evidentiary hearing request. Subsequently, on July 27, 1990, ARCO filed a Revised Request for Hearing, in which the firm narrowed the scope of its request for an evidentiary hearing. The ERA again filed a Response in opposition to ARCO's Revised Request, on August 15, 1990. Ultimately, in a letter ruling issued on August 28, 1990, OHA

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[6] In addition to the ERA's Comments, we authorized and received, on June 1, 1990, Comments filed by representatives of the plaintiff class in Van Vranken v. Atlantic Richfield Company, C-79-0627-SW (N.D. Cal.), in conjunction with Sinclair Oil Corporation (the "Interested Parties"). In their Comments, the Interested Parties oppose ARCO's Appeal essentially on the same grounds as the ERA, *viz.*, that the Application to Refile is barred by the Consent Order and because ARCO failed to pursue timely appeals of its previous refiling denials. The Interested Parties raise an additional argument that the refiling period sought by ARCO is improper in any event since, as a result of pertinent agency promulgations subsequent to the April 30, 1974 V factor amendment, the *Mobil* decisions provide no legitimate basis for a retroactive reallocation of V factor costs for time periods after August 1, 1974. *See* Interested Parties' Comments at 11-18. We have determined, however, that we need not reach that issue in our consideration of ARCO's Appeal.

determined that ARCO had failed to establish the existence of genuine factual disputes to justify the convening of an evidentiary hearing, but that a hearing for the purpose of oral argument should nonetheless be convened for greater explication of the numerous legal issues materially in dispute. Letter of August 28, 1990, from Thomas O. Mann, Deputy Director, OHA, to David L. Roll, Esq.[7] A hearing for the purpose of oral argument was then convened on October 4, 1990, at which representatives of ARCO, the ERA and the Interested Parties (see note 6, *supra*) presented oral testimony and documentary evidence concerning ARCO's Application for Exception and Appeal. *See* Transcript of Hearing, Atlantic Richfield Company, Case No. LEA-0001 (hereinafter "Tr.").

II. *Analysis*

A. Whether ARCO's Application to Refile is Barred

The ERA first challenges ARCO's Application to Refile on procedural grounds, arguing that it is barred and should be rejected: (i) because ARCO failed to appeal the ERA's prior denials of ARCO refiling requests; (ii) under the doctrine of laches, in view of Arco's undue delay in filing

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[7] According to ARCO's Response, the ERA's Comments raised factual disputes concerning: (i) whether ARCO knew or should have known prior to *Van Vranken* that it would be necessary to obtain DOE's permission to use corrected V factors in private overcharge litigation; (ii) whether DOE acquiesced in the *Mobil* decisions following *Mobil III* and used corrected V factors for purposes of estimating overcharge liability in settlements with ARCO and other refiners; and (iii) whether the parties to the 1985 Consent Order intended the settlement to preclude subsequent applications for permission to correct V factors for use in private litigation. *See* ARCO Response at 40-41. ARCO urged that an evidentiary hearing be convened with respect to these matters, pursuant to 10 C.F.R. § 205.105(d). However, the ERA conceded the second matter in its Response to Supplemental Request for Hearing. We determined in our letter of August 28, 1990, that the first and third issues identified by ARCO essentially involved matters of legal interpretation, and were therefore inappropriate for examination in the context of an evidentiary hearing.

the Application to Refile and the resulting prejudice to the ERA; and, (iii) under the terms of the Consent Order. The respective positions of the parties on these matters have been substantially developed in the pleadings submitted in this Appeal. For the reasons below, we have determined that ARCO's Application to Refile is not barred on any of the alternative grounds advanced by the ERA.

(1) Prior refilings

We cannot accept the ERA's position that ARCO's Application to Refile is barred since ARCO failed to appeal the ERA's prior denials of ARCO refilings containing V factor corrections. As indicated above, ARCO submitted Applications to Refile its RMCAR's to adjust its V factors on four instances prior to the present: in March 1980, April 1980, August 1981 and March 1982. In the first three instances, the agency issued letter determinations rejecting ARCO's refiling since various aspects of the *Mobil* litigation were yet pending. The ERA generally asserted in each instance that until DOE had received a final resolution, ARCO's refiling was without basis.[8] Thus,

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[8] For instance, the agency stated in its letter rejecting ARCO's March 1980 submission, that:

> The cited Mobil decision apparently relied upon by Atlantic Richfield in the computations embodied in the twelve month EIA-14 resubmission is under petition by the Department of Energy for a Writ of Certiorari to the Supreme Court of the United States. Pending adjudication by that tribunal, and pending remand and further opinion from the Federal District Court as ordered by the Temporary Emergency Court of Appeals (and the complete adjudication of any appeals which may result subsequently), it is the position of the Office of Special Counsel that the regulations as promulgated are valid and enforceable, and that the TECA decision in the Mobil case does not provide Atlantic Richfield authority to alter the calculations currently required by Section 212.83.

Letter of April 18, 1980, from Felipe Garcia, Pacific District Office of Special Counsel, DOE, to William R. Wilson, ARCO; *see* ARCO's Application to Refile Exhibit H.

the agency's position was that the first three ARCO refilings were premature. In view of the agency's stated basis for these denials, we are not persuaded that ARCO's failure to appeal these determinations should unduly prejudice or pose a bar to ARCO's present application filed subsequent to the *Mobil* litigation.

Nor are we persuaded that ARCO's failure to file an appeal with respect to its March 1982 attempted refiling constitutes grounds to bar ARCO's present Application to Refile. The final TECA decision in *Mobil III* was issued on April 29, 1982, approximately one month after this refiling request. Section 212.126(d)(3) states unequivocally that "[t]he [ERA] will dispose of each application in writing, with a concise statement of the reasons for granting or denying the application"; it then states that "[t]he disposition of such an application shall be subject to appeal as an order under Subpart H of Part 205." Notwithstanding, the ERA failed to issue any written determination with respect to ARCO's March 1982 refiling. The ERA suggests that despite the absence of a written determination, ARCO could have brought an appeal pursuant to 10 C.F.R. § 205.96 (see note 1, *supra*), as in the present instance. *See, e.g.*, Tr. at 37. Section 205.96 provides, however, that in the event the agency fails to act upon an application within 90 days of filing, "the applicant *may* treat the application as having been denied in all respects and *may* appeal therefrom . . ." (emphasis supplied). ARCO states that it exercised its discretion not to treat the ERA's silence with respect to its March 1982 refiling as a denial and not to file a formal appeal under section 205.96, since within a few months after the submission it entered into the settlement negotiations during which the ERA accepted its amended V factors. *See* ARCO Response at 6-8; Tr. at 76. We leave to ARCO's own conscience whether that determination was prudent. We concur with ARCO's position, however, that its determination not to file an appeal regarding the March 1982

refiling should not bar its present Application to Refile when the ERA failed to issue a written determination as specifically required under 10 C.F.R. § 212.126(d)(3).[9]

(2) Laches

Next, the ERA argues that ARCO's Application to Refile and this Appeal are barred under the doctrine of laches by reason of: (i) ARCO's inexcusable delay in seeking to revise its V factor allocations, and (ii) the resulting prejudice to DOE. ERA Comments at 4, citing *Mobil Oil Corp. v. Department of Energy*, 728 F.2d 1477, 1488 (Temp. Emer. Ct. App. 1983). The ERA asserts that inexcusable delay is clearly present since ARCO's latest refiling comes nearly 16 years after the amended V factor rule was promulgated, 12 years after the rule was originally challenged, ten years after the rule was declared invalid, nine years after decontrol, eight to ten years after ARCO failed to appeal denials of prior refilings, and five years after ARCO entered into a "global" settlement with DOE. *See id.* at 5. The ERA further maintains that ARCO's Application to Refile prejudices the agency since it impermissibly revives matters which were resolved by the Consent Order. *Id.* at 4. The ERA asserts that the agency would be required to devote substantial time and resources to auditing ARCO's refiled RMCAR's, raising issues that were intended by both parties to have been settled. *See* Tr. at 39, 53.

Laches is an equitable doctrine under which relief may be denied to one guilty of unreasonable delay in bringing an action, if undue prejudice would result to the adverse party. *See generally* Am. Jur. 2d, *Equity* § 152; *Gulf*

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[9] As a practical matter, the ERA Comments filed in the present Appeal constitute the "statement of the reasons for . . . denying the application" explicitly required under section 212.126(d)(3). We may have been required, however, to remand ARCO's Application to Refile to the ERA for a formal statement of reasons had the ERA failed to file explanatory comments in this proceeding.

Airborne Instruments v. Weinberger, 694 F.2d 838, 843 (D.C. Cir. 1982). The laches doctrine is rooted in the ancient maxim that "equity aids the vigilant, not those who slumber on their rights." 2 J. Pomeroy, *Equity Jurisprudence* § 418. However, laches is an affirmative defense and the determination whether laches bars an action is entirely within the discretion of the reviewing tribunal, based upon the facts and circumstances presented. *See National Wildlife Federation v. Burford*, 835 F.2d 305, 320 (D.C. Cir. 1987); *University of Pittsburgh v. Champion Products*, 686 F.2d 1040, 1045 (3rd Cir.), *cert. denied*, 459 U.S. 1087 (1982). Based upon the circumstances presented in this proceeding, we have determined that ARCO's Application to Refile is not barred by laches.

Initially, we disagree with the ERA's alternative suggestions that the date the amended V factor rule was promulgated, or the date the rule was originally challenged or declared invalid, should be used to measure the degree of any inexcusable delay on the part of ARCO. The action which ARCO presently seeks is the acceptance of refiled RMCAR's. As indicated above, ARCO sought to refile its RMCAR's on the basis of the *Mobil* trilogy on four occasions beginning in March 1980, and until the *Mobil* litigation was finally resolved in 1982, the agency informed ARCO that its refilings were premature. Thus, we believe that any proper measure of delay on the part of ARCO is the nearly eight years from the time ARCO failed to pursue its formal refiling request in 1982.

We are unpersuaded that the eight year delay may be properly utilized by the ERA to invoke laches. Equally rooted in equity as the doctrine of laches is the precept that the party asserting the defense must have "clean hands." *See* Am. Jur. 2d, *Equity* § 153; *Personal Properties, Inc. v. Financial & Real Estate Consulting Co.*, 752 F.2d 178, 182-83 (5th Cir. 1985). In the present case, we are unable to say that the ERA is completely without fault

when, as discussed above, the ERA failed to issue a written determination rejecting ARCO's March 1982 refiling as specifically required under the section 212.126 (d) (3), and then accepted ARCO's V factors revised in accordance with *Mobil* for the purpose of settlement negotiations.

Further, we believe that the ERA has overstated the degree to which it has been prejudiced by ARCO's delay in filing the present application. The ERA asserts that during settlement negotiations it accepted the *Mobil* V factors contained in ARCO's revised 1979 Restatement as a matter of compromise, but did not formally accept or audit the refiling and indeed specifically questions the accuracy of certain figures contained in the revised RMCAR's. *See* Tr. at 52-53. The ERA maintains that it is prejudiced since the present Application to Refile would require the ERA to now audit the RMCAR's contained in the 1979 Restatement and thus revive issues which it considered settled by the Consent Order. However, the ERA would have been required to audit the RMCAR's even if ARCO had timely appealed its previous refiling or filed a renewed Application to Refile in 1982. The fact of the ERA having to audit the RMCAR's and examine the underlying issues did not result from ARCO's delay, but is instead a requirement imposed by the regulations themselves.[10] Only prejudice which directly results from in-

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[10] In this regard, ARCO contends that the ERA is disingenuous in its assertion that it would be required to audit ARCO's refiled RMCAR's, claiming that this assertion is merely "a canard." *See* Tr. at 29. ARCO suggests that all the ERA need do is "rubber stamp" the *Mobil* V factors which the ERA already accepted in the context of settlement negotiations. ARCO is incorrect. The ERA's verification of the refiled RMCAR's is clearly a condition of refiling under section 212.126(d). *See* 44 Fed. Reg. 14534 (1979); *see* Crown Central Petroleum Corp., 13 DOE ¶ 83,024 at 86,175 (1985). Moreover, the ERA has clarified that although it accepted ARCO's revised V factors for purposes of settlement negotiations, it in no way endorsed the accuracy of the underlying figures. *See* ERA Comments at 16-18.

excusable delay is properly considered in determining the applicability of laches. *See West Wind Africa Line v. Corpus Christi Marine Services Co.*, 834 F.2d 1232, 1234-35 (5th Cir. 1988). We recognize that the task of auditing the revised 1979 Restatement is made more difficult by the passage of time since the issues and pertinent records have now grown cold. We are unpersuaded, however, that this degree of prejudice warrants the invocation of laches to bar ARCO's present Application to Refile where, as here, the equitable footing of the ERA is not completely firm.

(3) Consent Order

Finally, the ERA maintains that ARCO's Application to Refile is barred by the Consent Order executed with ARCO in 1985. In support of its position, the ERA relies on ¶ 501 of the Consent Order:

> ¶ 501. All pending and potential civil and *administrative claims, whether or not known, demands, liabilities, causes of action or other proceedings regarding ARCO's compliance with the Federal Petroleum Price and Allocation regulations during the period covered by this Consent Order, irrespective of whether heretofore raised* by an issue letter, notice of probable violation, notice of proposed disallowance, proposed remedial order, proposed order of disallowance, remedial order, notice of disallowance, or otherwise are *resolved and extinguished by this Consent Order.*
> . . .

50 Fed. Reg. 8366, 8372 (1985) (emphasis added). The ERA further relies on Consent Order ¶ 502(d):

> ARCO expressly agrees that in consideration of DOE's performance under the Consent Order, *ARCO releases DOE completely and for all purposes from all administrative and civil judicial claims, liabilities or causes of action ARCO has asserted or might other-*

> *wise be able to assert againt DOE* under the Federal Petroleum Price and Allocation Regulations, except for matters specifically excluded from this Consent Order.

50 Fed. Reg. at 8373 (emphasis added). The ERA argues that ARCO's Application to Refile and Appeal are "administrative claims" which were extinguished by the Consent Order, and that ARCO agreed to release DOE completely from such claims irrespective of whether ARCO were able to foresee the need for refiling at time the Consent Order was executed. *See* ERA Comments at 6; Tr. at 40-44. In effect, the ERA argues that the Consent Order precludes even the filing of ARCO's Application to Refile, and the ERA need not consider whether the Application to Refile meets the requirements 10 C.F.R. § 212.126 (d) on the merits. We cannot agree. We have determined that neither by its letter nor by its apparent intent does the Consent Order constitute a bar to ARCO's Application to Refile.

First, the ERA incorrectly relies upon ¶ 501 of the Consent Order in support of its position. Paragraph 501 by its specific language extinguished all enforcement matters existing and which could potentially be raised by DOE against ARCO, except those itemized in the succeeding paragraphs. It released ARCO with regard to these matters, not DOE. Clearly, therefore, that paragraph does not constitute a bar to ARCO's Application to Refile.

Nor do we find that ¶ 502(d) should be construed to constitute a bar to the filing of ARCO's Application to Refile. The ERA concedes that the matter of refiling of forms was never considered during settlement negotiations leading to the Consent Order, but maintains nonetheless that ARCO's application to Refile is barred by the express terms of the Consent Order. *See* ERA Response to ARCO's Supplemental Request for Hearing, filed July 13, 1990, at 22-23. We find nothing in the language of ¶ 502

(d) which explicitly bars the filing of ARCO's Application to Refile. We recognize, as asserted by the ERA, that the language "all administrative and civil judicial claims, liabilities or causes of action" is quite broad in scope. However, context of this broad language makes clear that the intent of that paragraph was to release DOE from all enforcement matters then existing and to preclude any enforcement matters which ARCO might later "*assert against*" DOE.

The mere filing of an Application to Refile does not *ipso facto* constitute an enforcement matter "assert[ed] against" DOE. Indeed, in the preamble to the Notice of Final Rulemaking of 10 C.F.R. § 212.126(d), the agency stated that a refiling of RMCAR's was proper in many instances, noting that certain cost allocation options were available upon election by refiners and "[RMCAR's] sometimes require the use of estimated data and that in dealing with such calculations some good faith errors are unavoidable." 44 Fed. Reg. 14534 (1979). In such instances, a refiling of RMCAR's to correct technical errors could certainly not be deemed to constitute an enforcement matter asserted against DOE. While a refiner might improperly refile RMCAR's in an attempt to avoid a compliance action, thus giving rise to an enforcement matter, that may only be ascertained upon examination by the agency, *viz.* in the context of determining whether "good cause" exists for the refiling and, if so, upon verification and approval of the underlying cost data. We reject the notion that, without examination, the mere submission of an Application to Refile by ARCO is itself an enforcement matter asserted against DOE which is therefore barred by the Consent Order.[11] *Cf. Chevron U.S.A., Inc.*, 12 DOE ¶ 80,103 (1984).

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[11] Two observations are worthy of note in this regard. First, as made clear later in this decision, our determination that ARCO is not barred from filing the Application to Refile by the Consent Order does not mean the existence of the Consent Order may not

B. "Good cause"

In its present Appeal, ARCO maintains that the ERA should have accepted its Application to Refile because: (i) in the *Mobil* cases, TECA declared that the V factor adjustments described in ARCO's Application to Refile were the correct V factors for months prior to February 1976; (ii) DOE has already accepted ARCO's *Mobil* V factors; and, (iii) TECA's decision in *Van Vranken* made it necessary for ARCO to obtain DOE's permission to use corrected V factors to mitigate its potential damage liability in private overcharge litigation. We have concluded, however, that the ERA correctly determined that "good cause" has not been shown by ARCO.

(1) The *Mobil* decisions

ARCO's contention that the *Mobil* litigation constitutes "good cause" for the acceptance of its refiling rings hollow. ARCO insists that "TECA has indicated that refiners' V factors should be corrected to conform with the *Mobil* decisions." Appeal at 5. Relying principally on language contained in *Mobil II* in which TECA struck down the April 1974 V factor amendment, ARCO maintains that "TECA could not have provided any clearer guidance to ERA, ARCO and other refiners." *Id.* at 6-7, citing *Mobil II*, 647 F.2d at 145. However, we believe there is no better interpreter of the *Mobil* decisions than TECA itself. In this regard, TECA's *Van Vranken* decision is dispositive.

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be considered in determining whether "good cause" exists for the refiling. Secondly, the parties disagree whether ARCO's refiling would in fact give rise to a compliance matter in dispute, within the prohibitive scope of the Consent Order, if the ERA were required to perform verification and approval of the refiled RMCAR's. ARCO claims that the ERA has already, in principle, accepted the RMCAR's which it presently seeks to refile, see note 10 *supra*, while the ERA maintains that many of the underlying figures are questionable. *See* Tr. at 52-53. However, for the reasons discussed in the succeeding sections of this decision, we need not reach that issue.

In *Van Vranken*, TECA considered alternative contentions by ARCO regarding the invalidation of the April 1974 V factor amendment in the *Mobil* cases. ARCO argued that in private overcharge litigation: (1) ARCO *must* retroactively reallocate its costs from exempt to covered goods, or in the alternative (2) ARCO *may* reallocate its costs from exempt to covered products.[12] In rejecting these contentions, TECA gives clear indication that in fact the ERA should accord no weight to the *Mobil* decisions in determining whether "good cause" exists for the refiling which ARCO seeks. As explained by TECA below, nothing in the *Mobil* decisions suggests that all refiners were required or must be permitted to retroactively reallocate costs on the basis of the invalidation of the April 1974 V factor amendment; rather, that remedy was limited to Mobil. TECA further ruled that ARCO may not even rely upon the *Mobil* precedents to accomplish a retroactive reallocation of costs by similarly challenging the V factor amendment, since ARCO has now waived its right to do so by failing to challenge the amendment in a timely manner.

TECA states specifically in *Van Vranken* that neither *Mobil I* or *Mobil II required* Mobil to retroactively reallocate costs but rather they "permitted . . . Mobil to allocate exempt product costs to covered products." *Van Vranken*, 890 F.2d at 423, *quoting Mobil I*, 610 F.2d at 805; *see also Mobil II*, 647 F.2d at 146-47 ("the judgment

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[12] Before proceeding with its consideration, TECA noted that "[s]everal lower courts have addressed these issues and have rejected the arguments ARCO presently advances." 890 F.2d at 423, citing Naph-Sol Refining Co. v. Murphy Oil Corp., 550 F. Supp. 297 (W.D. Mich. 1982), mod'd on other grounds, sub. nom. Mobil Oil Corp. v. Department of Energy, 728 F.2d 1477 (1983), cert. denied, 467 U.S. 1255 (1984); Kickapoo Oil Co., Inc. v. Murphy Oil Corp., No. 78-C-478-C (W.D. Wis., December 28, 1983); Martin Oil Service, Inc. v. Koch Refinding Co., 718 F. Supp. 1334 (N.D. Ill. 1989); U.S. Oil Company, Inc. v. Koch Refining Co., No. 79-C-659 (E.D. Wis., March 13, 1989).

is correct insofar as it permits Mobil to allocate exempt product costs to covered products . . ."). TECA further observed that, even absent the V factor amendment, nothing in the regulations required that costs for exempt products be attributed to covered products when calculating allowable prices, and thus there was nothing unlawful in the method whereby ARCO allocated its increased costs which resulted in prices within the lawful maximum. More simply stated, TECA's invalidation of the V factor amendment did not render ARCO's election unlawful. TECA therefore concluded that "there is no support for ARCO' s contention that refiners are *required* to retroactively reallocate costs based on *Mobil I* and *Mobil II*. . . ." *Van Vranken*, 890 F.2d at 423. Since TECA determined that ARCO was not required under the regulations to reallocate costs based upon the invalidation of the V factor amendment, we must conclude that correspondingly the *Mobil* decisions do not compel a finding of "good cause" for the acceptance of ARCO's present refiling in which the firm seeks to accomplish this same retroactive reallocation of costs. Nothing in the *Mobil* cases indicates that ARCO, or any other refiner not subject to that litigation, must be permitted to reallocate costs employing unamended V factors.

Nor are we persuaded that in view of the *Mobil* trilogy ARCO should be permitted to perform the retroactive reallocation of costs it seeks. The ERA has clearly not abused its discretion in determining that the *Mobil* cases do not constitute "good cause" for the acceptance of ARCO's refiling. Again, the *Van Vranken* decision leads to the opposite conclusion. In considering the question of whether ARCO *may* retroactively reallocate costs under the *Mobil* cases, TECA determined that two questions were presented: (i) whether ARCO must first obtain permission from DOE, and (ii) whether ARCO waived any right to retroactive reallocation by failing to timely challenge the 1974 amendment. Regarding the first issue,

TECA ruled that ARCO's failure to obtain permission from DOE to retroactively reallocate costs in the context of a formal refiling under 10 C.F.R. § 212.126(d), precluded ARCO from any relief by the court. *Id.* at 423-24, *citing Eastern Air Lines v. Atlantic Richfield Co.*, 712 F.2d 1402, 1408-09 (Temp. Emer. Ct. App.), *cert. denied*, 464 U.S. 915 (1983). Then, addressing the matter of timeliness, TECA stated:

> We further find that *ARCO waived its right to relief by not challenging the regulation in a timely manner.* At oral argument, ARCO suggested that once we declared the 1974 amendment invalid, refiners had an indefinite period in which to retroactively reallocate costs. This argument is without merit. If ARCO believed the 1974 amendment was invalid, the company should have taken steps to protest the regulation rather than attempt to jump on Mobil's coattails five years after the amendment became effective. ARCO could have, like Mobil, challenged the regulation. The company could have also sought to intervene in Mobil's action, or requested administrative relief as Getty [Oil Company] did. *Having failed to challenge the regulation in a timely manner, ARCO is not entitled to relief at this late date.*

Id. at 424-25 (emphasis added). Thus, notwithstanding the *Mobil* cases, TECA definitively closed the door on any attempt by ARCO to challenge the April 1974 V factor amendment. We find incongruous ARCO's position that although TECA has ruled that "Mobil's coattails" are no longer available to ARCO for that purpose, the firm may nevertheless rely on the *Mobil* decisions to "bootstrap" a showing of good cause for the acceptance of its refiling by DOE at this late date. Any interest on the part of DOE with respect to ARCO's cost allocations was ended by decontrol of oil prices in 1981 and by the Consent Order in 1985, which resolved all enforcement matters, existng and

potential, between ARCO and DOE. Absent any remaining governmental interest in ARCO's compliance with the former price controls and in view of TECA's holding that ARCO has now waived its right to challenge the 1974 V factor amendment, the *Mobil* decisions simply do not constitute good cause.

Instead, we are left with DOE's official pronouncement with regard to cost reallocations of the type which ARCO seeks in its Application to Refile. In that regard, we need look no further than the 1981 rulemaking in which the agency promulgated the amended V factor rule. The agency stated in pertinent part:

> Generally, our regulations allow for refiling of increased costs only within one year of the original report. 10 C.F.R. 212.126(d)(1). Exceptions are only made for "good cause." 10 C.F.R. 212.126 (d)(2). In adopting this rule today, *we are in effect determining that no good cause exists* to allow refiners on an industry-wide basis to retroactively include increased crude oil costs volumetrically attributable to exempt products. *No good cause exists because a rule that precludes the passthrough on covered products of costs not volumetrically attributable to those products best furthers the purposes of the EPAA.*

46 Fed. Reg. 7776, 7782 (1981) (emphasis added). ARCO argues that this language is inapposite since in *Mobil III*, TECA invalidated this rulemaking to the extent the agency attempted to make retroactive the repromulgation of the amended V factor rule. *See* Appeal at 7-9. We disagree. As made clear by TECA's more recent holding in *Van Vranken*, only a refiner which challenged the amended V factor rule on a timely basis, not ARCO, may bring itself under the *Mobil* umbrella. We therefore find no reason to ignore the agency's stated position that "good cause" does not exist for the retro-

active reallocation of costs which ARCO seeks would contravene the purposes of the EPAA.[13]

(2) DOE acquiescence

We also find without merit ARCO's claim that there is "good cause" for the acceptance of its refiling based upon the agency's actions and statements following *Mobil III*. ARCO asserts that following TECA's decision in *Mobil III*, the agency permitted refiners, including ARCO, to use *Mobil* V factors for the period prior to February 1976 in settlement negotiations. In this regard, ARCO has submitted the Affidavit of Rayburn Hanzlik, for Administrator of ERA, who acknowledges that following *Mobil III*, the agency acquiesced in the use of the unamended V factor formula in settlement negotiations and brought no enforcement actions against refiners on the basis that they calculated V factors in that manner. Appeal at 10-12, quoting Affidavit of Rayburn Hanzlik, Application to Refile Exh. D, ¶¶ 5 and 7.

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[13] Indeed, in Martin Oil Service, Inc. v. Koch Refining Co., 718 F. Supp. 1334 (N.D. Ill. 1989), the District Court specifically endorsed the efficacy of the agency's pronouncement, notwithstanding the *Mobil* decisions, in considering a purported refiling involving circumstances substantially similar to the present:

> Suffice it to say that Koch did not receive DOE permission *prior* to its 1980 refiling. In fact, DOE chose to publish a class-wide rejection of the multiple refiner refilings which followed *Mobil I* as firms attempted to reallocate increased costs. *See* 46 Fed. Reg. 7782 (Jan. 23, 1981) ("we are in effect determining that no good cause exists to allow refiners on an industry-wide basis to retroactively include increased crude oil costs volumetrically attributable to exempt products").
>
> This has led other courts to consider such refilings illegal in the face of what might be interpreted to be agency acquiescence—here, for example, Koch's claim that DOE "has never rejected the August 1980 forms" . . . .

718 F. Supp. at 1351, citing Kickapoo Oil Company, Inc. v. Murphy Oil, No. 78-C-478-C (W.D. Wisc. 1983).

However, even accepting the validity of these assertions, the agency's enforcement and settlement practices do not amount to a showing of "good cause" for the acceptance of a formal refiling. The ERA has explained that it accepted ARCO's V factors during settlement negotiations only as a point of compromise to move settlement negotiations forward. *See* Tr. at 49-51. An agency determination to accept certain bargaining points, e.g., unamended V factors, in the give and take of settlement negotiations with a refiner is not a binding policy nor in any way does it supersede the formal refiling requirements of 10 C.F.R. § 212.126(d). *See Crown Central Petroleum Corp.*, 13 DOE ¶ 83,024 at 86,174-77 (1985). Moreover, as stated by TECA, "[n]othing in the invalidation of the 1974 amendment had any effect on the refiling regulations and nothing in the refiling regulations excepts refiners from compliance when an allocation regulation is invalidated. . . . [T]he regulations governing retroactive reallocation are no less effective because the 1974 amendment was invalidated." *Van Vranken*, 890 F.2d at 424. Thus, neither the invalidation of the 1974 amendment nor any resulting settlement practice adopted by the agency eliminated the formal refiling requirements of section 212.126(d). The agency's settlement practices and the policy objectives of the refiling regulations are completely separate. Thus, DOE never acquiesced in ARCO's filing of unamended V factors.

(3) The *Van Vranken* decision

Finally, we find untenable ARCO's contention that good cause exists because its refiling was "necessitated" by *Van Vranken*. According to ARCO, it had no reason to seek DOE's permission to refile before *Van Vranken*, "in which TECA for the first time held that compliance with DOE's refiling regulations is relevant to the determination of overcharges in private actions. . . ." Appeal at 12. ARCO claims that the essence of TECA's decision is that

"[i]f you want to use these adjusted V's in a private case, you've got to get permission." Tr. at 12. ARCO's reading of *Van Vranken* is specious. While it is correct that TECA held that ARCO had failed to comply with refiling prerequisite of 10 C.F.R. § 212.126(d)(2), we find nothing in the decision which directs or invites ARCO to refile at this juncture.[14]

Indeed, to the contrary, if there is any indication which may be readily extracted from the *Van Vranken* decision, it is that ARCO should not now seek to refile since it would be a futile exercise. Citing a myriad of cases, TECA observed that several courts have already rejected attempts, such as that advanced by ARCO, to perform a retroactive reallocation of costs in private overcharge litigation based upon the invalidation of the 1974 V factor amendment in the *Mobil* litigation. 890 F.2d at 423; see cases cited in note 12, *supra*. These cases make clear that retroactive cost reallocations of this type have been disfavored by the courts. ARCO refuses to recognize that above all else in *Van Vranken*, TECA affirmed the U.S. District Court's decision in *Van Vranken v. Atlantic Richfield Company*, 699 F. Supp. 1420 (N.D. Cal. 1988). There, the District Court explained why it would be inappropriate at this late date to permit ARCO to reallocate its costs in other private overcharge actions:

> Obviously the *Mobil* decisions invalidating the April 1974 amendment establish that a plaintiff cannot sue for over-recoveries which stemmed from a refiner's improper use of this rule. The decisions indicate that

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[14] Noting that ARCO had previously failed to obtain DOE's permission to refile, TECA stated that "[i]f ARCO thought the DOE erred in not granting the company permission to retroactively reallocate its costs, ARCO could presumably have brought an action appealing the DOE's decision." *Van Vranken*, 890 F.2d at 424 n.2. Thus, TECA simply observed that ARCO had failed in its attempt to refile previously. ARCO's supposition that TECA thereby "necessitated" the present refiling is to stretch the court's dicta beyond reasonable bounds.

> correct posture for a refiner in an exogenous world would have been to ignore the amendment and to continue to include the exempt product prices in the denominator of the V factor. Refiners like ARCO, however, followed the amendment and excluded the prices. The fact that the *Mobil* decisions later invalidated the amendment does not mean that ARCO can now go back and allocate more costs to the products it sold and thus expand its banked costs. The court notes that this proposal would be akin to permitting a refiner to return to its customers after a dozen years had passed and inform them that it undercharged them: The refiner mistakenly operated under a recently invalidated regulation which set the prices too low, so it should now be permitted to ask the customers to pay the difference on products sold and consumed many years ago. Whether the costs are banked for the future or extracted from the customer in the price of today's goods, the result is the same.

699 F. Supp. at 1425 (footnote omitted). Then, in considering the matter of a refiling of cost forms by ARCO, the District Court stated that "[i]f ARCO *had received* permission from the DOE to include the exempt products costs in its covered products costs, or if ARCO ever applied to the DOE during a grace period, it is *possible* that the refiner *might still be allowed to adjust its V factor* as it desires. The court determines that ARCO did neither of these things." *Id.* at 1427 (emphasis added). Thus, the District Court was unmistakable in its judgment that it was too late for a reallocation of costs by ARCO. In *Eastern* and again in *Van Vranken*, the courts made it clear that the avenues on which ARCO might have proceeded are now closed.

In any event, even were we to accept, *arguendo*, that TECA suggested in *Van Vranken* that ARCO should again seek DOE permission to refile, that suggestion is irrelevant to a finding of "good cause" under section

212.126(d). An invitation to seek permission does not constitute grounds for the approval of permission any more than the mere filing of an application means that the application must be approved. ARCO's Application to Refile must be evaluated on its own merits in determining whether "good cause" exists for the acceptance of the refiling. As discussed above, ARCO has failed to meet that standard.

C. Due Care and diligence

We have further determined that ARCO fails the satisfy the "due care and diligence" provision of refiling regulation. Section 212.126(d)(3) states, in pertinent part, that "[w]here it appears that such a finding [of good cause] may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to modify did not result from a failure to exercise due care and diligence." Under the circumstances presented, we have concluded that ARCO has failed to meet this requirement.

ARCO claims in its Appeal that a showing of "due care and diligence" is not required in this case since there is no indication that the approval of its Application to Refile "may adversely affect the interest of the consuming public." In this regard, ARCO argues that: (i) public interest issues relating to this matter were resolved by TECA in the *Mobil* cases in favor of ARCO; (ii) since price controls have ended, ARCO's prices will be unaffected by revisions of its RMCAR's, (iii) permitting ARCO to properly avail itself of valid regulations (including unamended V factors) for purposes of the *Van Vranken* litigation cannot adversely affect the "consuming public", and (iv) the plaintiffs in *Van Vranken* are "wholesale purchaser-resellers", not consumers, and consequently there is no harm to the public interest." *See* Appeal at 15-16. We do not accept these assertions.

As held by TECA, ARCO has now lost the opportunity to ride on the coattails of *Mobil*. However, in any event and despite *Mobil*, it is clear that permitting ARCO to refile its RMCAR's "may" adversely affect the consuming public. ARCO attempts to avoid that conclusion by raising the purported inequity of relegating the firm to uncorrected V factors in the *Van Vranken* litigation. Notwithstanding, the fact remains that permitting ARCO to now modify its V factors would, as conceded by ARCO, "prevent plaintiffs in *Van Vranken* and *Sinclair* from reducing ARCO's banks of unrecovered costs, thus making it more difficult for them to prove liability and overcharges in those cases . . . ." Appeal at 15-16. This certainly constitutes an adverse affect upon third parties.

Further, we reject ARCO's supposition that because the plaintiffs in *Van Vranken* are comprised of "wholesale purchaser-resellers" as opposed to end-users, any impact upon them as a result of ARCO's refiling cannot be considered to "adversely affect the interest of the consuming public." We find no basis for that distinction in the regulation. The agency does not define or even mention the phrase "interest of the consuming public" in the Notice of Final Rulemaking adopting 10 C.F.R. § 212.126 (d)(2), but states only that "the burden is on the applicant to demonstrate that the claimed errors or omissions in the initial report did not result from a failure to exercise due care and diligence." 44 Fed. Reg. 15534 (1979). We believe, however, that the phrase "interest of the consuming public" should be broadly construed to embrace the policy objectives of the EPAA, pursuant to which the regulation was promulgated. In that regard, section 4(b)(1)(F) of the EPAA provides for, in pertinent part, "equitable distribution of . . . refined petroleum products at equitable prices among all . . . sectors of the petroleum industry." [15] Consequently, it is

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[15] We further note that despite the termination of price controls, achieving restitution for overcharge victims has remained a princi-

incumbent upon ARCO to show that the firm exercised due care and diligence with regard to V factors which it now seeks to modify. For the reasons below, we have determined that ARCO has failed to make that showing.[16]

While ARCO once may have started to exercise "due care and diligence" in attempting to correct its V factors following the initial *Mobil* decisions, the firm never saw that effort through to completion. We find no legitimate justification for ARCO's failure to appeal the ERA's nonacceptance of its March 1982 refiling or to make any other attempt to formally refile its RMCAR's prior to the present Application to Refile. The *Van Vranken* litigation was initiated in March 1979. Even though the ERA let ARCO use adjusted V factors for the limited purpose of settlement negotiations, ARCO should have recognized that the only certain way it could protect its interests in the *Van Vranken* litigation was by pursuing and gaining formal acceptance of its March 1982 refiling. We cannot accept ARCO's contention that the firm was justified in its curious decision not to press for acceptance of a formal refiling.

As explained earlier, TECA ruled in *Van Vranken* that ARCO was required to make a formal refiling under sec-

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pal interest of the agency. *See* 10 C.F.R. Part 205, Subpart V. Indeed, in that regard, we have specifically recognized members of the *Van Vranken* class of plaintiffs as claimants entitled to restitution in the refund proceeding for ARCO customers established under Subpart V. *See* Atlantic Richfield Company, 17 DOE ¶ 85,069 at 88,149-50 (1988).

[16] We differentiate our determination that ARCO failed to exercise due care and diligence from our ruling above in which we rejected the ERA's contention that ARCO's Application to Refile is barred on the basis of laches. While inexcusable delay is a primarily element in both instances, the requirement of "due care and diligence" is clearly set forth in section 212.126(d)(3). Laches, however, is an equitable doctrine; as discussed, the ERA had neither the equitable footing nor the ability to show the requisite prejudice to invoke that doctrine.

tion 212.126(d) based upon its holding in another private overcharge case involving ARCO, *Eastern Air Lines v. Atlantic Richfield Co.*, 712 F.2d 1402 (Temp. Emer. Ct. App.), *cert. denied*, 464 U.S. 915 (1983). ARCO has attempted to distinguish *Eastern Air Lines* on the basis of that a different type of cost reallocation was involved in that case. *See* ARCO Response at 12-14.[17] However, TECA addressed this matter in *Van Vranken*:

> ARCO attempts to distinguish *Eastern Air Lines* on the grounds that in *Eastern Air Lines* ARCO could choose how to allocate costs while in the instant case only one method for allocating increased costs was available. We do not find this distinction consequential. The central basis of the decision in *Eastern Air Lines* was that ARCO failed to obtain permission from the DOE to retroactively reallocate costs as required by the regulations. The failure to obtain permission from the DOE, not the nature of the initial allocation of costs, determined the outcome in *Eastern Air Lines*.

890 F.2d at 424. Accordingly, we must reject ARCO's contention that *Eastern Air Lines* provided no indication that a formal refiling with DOE would be required in order to claim adjusted V factors in private litigation. In essence, ARCO's position is simply that it disagrees with TECA regarding the interpretation of the state of the case law prior to *Van Vranken*. ARCO's position is futile; it refuses to accept what it must. On the basis of TECA's language in *Van Vranken*, it is evident that ARCO misjudged the import of the *Eastern Air Lines* decision. By myopically adopting a different reading of the decision, ARCO gambled and lost. We must conclude that for purposes of section 212.126(d)

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[17] Rather than a V factor adjustment, the *Eastern Air Lines* decision concerned an "H factor" adjustment whereby ARCO sought to retroactively allocate costs from its gasoline cost bank to other covered products. *See* 712 F.2d at 1408.

(3), ARCO failed to exercise due care and diligence in delaying and not seeking to modify the V factors in its RMCAR's until the present Application to Refile. ARCO's Application to Refile may be properly denied on this basis. *See Standard Oil Company of Ohio*, 9 DOE ¶ 80,101 at 80,502 (1981).

D. Conclusion

On the basis of the foregoing considerations, we have concluded that the ERA's determination denying ARCO's Application to Refile should be sustained. ARCO has failed to show that "good cause" exists for the acceptance of its refiling. 10 C.F.R. § 212.126(d)(2). In addition, ARCO has failed to demonstrate that the firm exercised "due care and diligence" in seeking the adjustments to its RMCAR's contained in its Application to Refile. *See id.* § 212.126(d)(3). We therefore find that the ERA's denial of ARCO's Application to Refile was not erroneous, arbitrary or capricious. Accordingly, the Appeal filed by ARCO should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Atlantic Richfield Company (ARCO) on April 16, 1990, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review.

/s/ George B. Breznay
GEORGE B. BREZNAY
Director
Office of Hearings and Appeals

Date: Feb. 1, 1991

APPENDIX E

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. DC-117

ATLANTIC RICHFIELD COMPANY,
Appellant,

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,

and

DON VAN VRANKEN, on behalf of himself and all others similarly situated,
Appellees.

Before: Grant, Peck and Weigel, Judges.

ORDER

Upon consideration of Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*, it is

ORDERED that said Petition for Rehearing is DENIED.

It is FURTHER ORDERED that the Petition For Rehearing *En Banc* is DENIED. The Court's mandate shall issue seven days from the date of this order—October 13, 1992.

FOR THE COURT:

CYNTHIA A. DYKES
Clerk

By: /s/ Sharon A. Krosel
SHARON A. KROSEL
Chief Deputy Clerk

October 6, 1992

(District Ct. No. 91-465)

APPENDIX F

UNITED STATES COURT
OF INTERNATIONAL TRADE

Court No. 88-05-00394

CERAMICA REGIOMONTANA, S. A., CERAMICAS Y PISOS INDUSTRIALES, DE CULIACAN, S.A., INDUSTRIAS, INTERCONTINENTAL, S.A.,

Plaintiff,

v.

THE UNITED STATES.

Defendant.

May 15, 1992, Decided

Brownstein, Zeidman and Schomer, (Steven P. Kersner and Ronald W. Wisla) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (Velta A. Melnbrencis) for defendant.

Before: MUSGRAVE, Judge.

Opinion By: R. KENTON MUSGRAVE.

OPINION

Introduction Plaintiffs Ceramica Regiomontana ("Ceramica,") Ceramica Y Pisos Industriales de Culiacan ("Culiacan") and Industrias Intercontinental ("Intercontinental") challenge the final results of an administrative review by the Department of Commerce of an order imposing countervailing duties upon imported ce-

ramic tile from Mexico. Ceramic Tile From Mexico, Final Results of Countervailing Duty; Administrative Review, 53 Fed. Reg. 15,090 (April 27, 1988). The review covers shipments imported during the period from July 1, 1984 to December 31, 1985. Plaintiffs' action is brought pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (1991). Jurisdiction lies in this Court under 28 U.S.C. § 1581(c) (1991).

Plaintiffs' original complaint was amended by motion to two counts. Ceramica Regiomontanta, S.A., et al. v. United States, Slip op. No. 90-107 (CIT 1990). Count One asserts that the International Trade Administration ("ITA") cannot impose countervailing duties on merchandise imported from Mexico after April 23, 1985, the date that Mexico became a "Country under the Agreement" within the meaning of 19 U.S.C. § 1671 (1991), without a determination by the International Trade Commission that the imports of such merchandise materially injure or threaten to materially injure a United States industry producing a like product. Because no injury determination covering plaintiffs' ceramic tile imports has been made, plaintiffs argue the antidumping duties imposed after April 23, 1985 are unauthorized.

In Count Two, Plaintiffs contend that the ITA improperly excluded companies receiving zero or de minimis benefits from its calculation of the country-wide countervailing duty rate under IPSCO, Inc. v. United States, —— Fed. Cir. (T) ——, 899 F.2d 1192 (1990).

The government argues that plaintiffs' claims are barred because plaintiffs did not raise them during the administrative proceedings. Plaintiffs acknowledge that they did not raise their claims below, but argue that the claims are properly before the Court because the issues are purely legal in nature and arose from judicial decisions issued subsequent to the administrative proceedings, and because exhaustion of administrative remedies would have been futile. Plaintiff's Reply to Defendant's Opposi-

tion to Plaintiffs' 56.1 Motion for Judgment on the Agency Record, at 2.

Exhaustion of Remedies

As a general rule, plaintiffs are required to exhaust the available administrative remedies before they may raise their claim in a civil action. Allen v. Regan, 9 CIT 615, 617 (1985). Exhaustion of remedies is not, however, a jurisdictional prerequisite; unless it is mandated by statute, application of the exhaustion doctrine is within the discretion of the court. Al Tech Specialty Steel Corp. v. United States, 11 CIT 372, 376, 661 F. Supp. 1206, 1209 (1987); Timken Co. v. United States, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986). In cases such as the one at bar, the court is directed by statute to require exhaustion of remedies "where appropriate." 28 U.S.C. § 2637(d) (1991).

In this Court's opinion granting plaintiffs' motion to amend their complaint, the Court found that exhaustion of administrative remedies was not required of plaintiffs, Count Two. Ceramica, Slip Op. 90-107, at 5. Despite the legal nature of plaintiffs' Count One, the Court now finds that it is appropriate to require exhaustion of adminstrative remedies for Count One.

One exception to the exhaustion doctrine is the situation "in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result." Ceramica, Slip Op. 90-107, at 5, quoting Hormel v. Helvering, 312 U.S. 552, 558-559, 61 S.Ct. 719, 722, 85 L. Ed. 1037, 1042 (1941). Because IPSCO was decided after plaintiffs filed their original complaint, the exhaustion requirement was held inapplicable to plaintiffs' Count Two. Plaintiffs argue that the exhaustion doctrine does not apply to Count One for similar reasons.

Plaintiffs assert that Count two arises from Cementos Anahuac del Golfo, S.A. v. United States, 12 CIT 401,

687 F. Supp. 1558 (May 12, 1988) ("Anahuac I"), which was decided shortly after the final results of the administrative review in this case were published. Ceramic Tile From Mexico, 53 Fed. Reg. 15,090 (April 27, 1988). In Anahuac I, the plaintiffs challenged the final results of an antidumping finding in which the ITA concluded that countervailing duties could be assessed upon cement imports from Mexico without any injury determination, despite the fact that Mexico had become a "country under the Agreement" under 19 U.S.C. § 1671 before the results were published. Anahuac I, 12 CIT at 402, 687 F. Supp. at 1559; Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order, 50 Fed.Reg. 51,732 at 51,736 (December 19, 1985).

Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1991) provides for the levy of countervailing duties on subsidized dutiable merchandise without injury determination by the International Trade Commission ("ITC"), "except in the case of an article of merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title)." Countervailing duties may not be imposed under 19 U.S.C. § 1671 on merchandise from a country under the Agreement without any injury determination.

Mexico became a country under the Agreement on April 23, 1985 as a result of an "Understanding between the United States and Mexico Regarding Subsidies and Countervailing Duties," (the "Understanding.") Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 18,335, 18,335-36 (1985). The Understanding stated in part,

> With respect to all United States countervailing duty investigations in progress concerning products of Mexico as of the date of entry into force of this Understanding, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the effects of the

> subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.
>
> Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties, (April 23, 1985) at paragraph 5; quoted in Cementos Guadalajara, S.A. v. United States, 12 CIT 307, 311, 686 F. Supp. 335, 339 (1988).

In Anahuac I, the ITA rejected the argument that the administrative review underway at the time Mexico became a country under the Agreement was an "investigation in progress" within the meaning of the Understanding. The ITA concluded that the Understanding did not apply to preexisting countervailing duty orders, and did not impose an obligation to provide an injury test during the review. Portland Hydraulic Cement and Cement Clinker From Mexico, 50 Fed. Reg. at 51, 736.

The Court of International Trade reversed the ITA, holding that although the tariff is determined at the time of entry, which predated Mexico becoming a country under the Agreement, the countervailing duty is not. The "determination of the presence of a bounty and of particularized benefit therefrom [and therefore the countervailing duty] post-dates the moment of entry, and that administrative process is governed by the law existent then." Anahuac I, 12 CIT at 406, 687 F. Supp. at 1563. Since Mexico became a country under the Agreement during the course of the administrative process, the Court held that an injury determination was required pursuant to 19 U.S.C. § 1671. Id.

Two nearly contemporaneous decisions drew the opposite conclusion. Cementos Guadalajara, S.A. v. United States, 12 CIT 307, 686 F. Supp. 335 (1988), and Cementos Anahuac del Golfo, S.A. v. United States, 12 CIT 525, 689 F. Supp. 1191 (1988) ("Anahuac II"). These cases held that "countervailing duty law provides for the imposition of duties on merchandise as it is entered even

though the actual amount of duties due may not be finally assessed until a later time, including after possible successive 751 reviews." Anahuac II, 12 CIT at 546, 689 F. Supp. at 1208, citing Cementos Guadalajara, 12 CIT at 328, 686 F. Supp. at 351-52. Since the goods in both cases had been entered before Mexico became a country under the Agreement, no injury assessment was deemed necessary. Id.

In a consolidated appeal of all three cases, the Court of Appeals for the Federal Circuit tersely reversed Anahuac I and adopted Anahuac II and Guadalajara. Cementos Guadalajara, S.A. v. United States, 7 Fed. Cir.(T) 113, 879 F.2d 847 (1989). Plaintiffs filed their complaint in this case before Anahuac I was reversed.

Unlike Ipsco, Anahuac I cannot affect the result in this case. Plaintiffs correctly point out that the Court of Appeals's decision in Guadalajara leaves unresolved the issue of whether the ITA may impose countervailing duties without an injury determination on dutiable merchandise from Mexico imported after Mexico became a country under the Agreement. Plaintiffs' Reply, n1 at 6.

When determining whether a question is precluded from consideration on appeal, the Court will assess the practical ability of a party to have its arguments considered by the administrative body. Al Tech, 11 CIT 377, 661 F. Supp. at 1210. In Timken, for example, plaintiffs sought remand for further review in light of Freeport Minerals Co. v. United States, 3 Fed. Cir. (T) 114, 776 F.2d 1029 (1985), which was decided after the administrative decision and while Timken was pending before this Court. Timken, 10 CIT at 91, 630 F. Supp. at 1334. Because the Freeport decision postdated the administrative proceedings, the Timken Court found that there was no danger that Timken had refrained from raising the issue below for tactical reasons. Id. The Court concluded that Timken had "arguably been taken by surprise by the Freeport decision; remand is called for so that its interests may be

protected by the review appropriate under the law." Timken, 10 CIT at 93, 630 F. Supp. at 1334

Unlike Timken, the present plaintiffs' case does not stem from an unforeseen change in the law, but rather, "the unambiguous and plain meaning of 19 U.S.C. §§ 1303(a)(1) and 1671(a)." Memorandum of Points and Authorities in Support of Plaintiffs' 56.1 Motion for Judgment on the Agency Record, at 32. The unambiguous and plain meaning of the statutes could not have taken plaintiffs by surprise. Nor did the Cementos cases affect plaintiffs' practical ability to raise their argument before the ITA.

Plaintiffs argue that in any event raising Count One before the ITA would have been futile. In cases where exhaustion of administrative remedies would have been futile or a useless formality, the Court of international Trade has made an exception to the exhaustion doctrine. Alhambra Foundry Co. v. United States, 12 CIT 343, 347, 685 F. Supp. 1252, 1256 (1988); Rhone Poulenc, S.A. v. United States, 7 CIT 133, 136, 583 F. Supp. 607, 610-611 (1984). In Rhone Poulenc, the Court noted that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation, and allowed plaintiffs to bring a claim not raised administratively.

Plaintiffs point out that subsequent ITA determinations have rejected their Count One claim e.g. Ceramic Tile From Mexico, 55 Fed. Reg. 50,744 (1990). They also argue that the determination challenged in Anahuac I, is an "identical" ruling. Portland Hydraulic Cement from Mexico, 50 Fed. Reg. 51,732 (1985). These rulings, plaintiffs maintain, establish the ITA's position and show that an adverse ruling on the claim is certain to have resulted if they had raised it.

Although subsequent administrative reviews support plaintiffs' contention that raising Count One before the ITA would not have affected the result plaintiffs do not

cite any prior reviews that show that ITA review would have been futile. The only determination cited that predates the administative review at bar is Portland Hydraulic Cement from Mexico, which did not involve entries made after Mexico became a "Country Under the Agreement." It does not show that seeking administrative relief on Count One would have been futile. Hindsight alone does not excuse the failure to pursue administrative remedies.

Plaintiffs have failed to point out any substantial impediments to exhausting the administrative remedies available to them on Count One. The Court finds no miscarriage of justice will result from the application of the exhaustion doctrine. The Court concludes that it is appropriate to require exhaustion of administrative remedies for Count One, and in its discretion, declines to exercise jurisdiction over the contention. Count One is dismissed.

Calculation of the Country-Wide Duty

Plaintiffs' second count contends that the ITA calculated country-wide countervailing duty rates in a manner subsequently held inappropriate in Ipsco, Inc. v. United States, —— Fed. Cir. (T) ——, 899 F.2d 1192 (1990).

The administrative review determined that the total bounty or grant during the period from July 1, 1984 through December 31, 1984 was zero or de minimis for forty-two named firms, 24.43 percent ad valorem for Culiacan, and 3.16 percent ad valorem for all other firms, including Ceramica and Intercontinental. For the period from January 1, 1985 to December 31, 1985, the total bounty or grant was determined to be zero or de minimis for forty named firms, 18.98 percent ad valorem for Culiacan and 4.17 percent ad valorem for all other firms, including Ceramica and Intercontinental. Ceramic Tile From Mexico, 53 Fed. Reg. at 15,090.

The government refers to the rates for Ceramics, Intercontinental and other firms without specified individual

rates as "all other" rates, and describes the method it uses to calculate them as follows. First, the ITA calculates a country-wide rate based on all companies being reviewed. If the country-wide rate is de minimis, the determination will be negative and no countervailing duty order will issue. If the country-wide rate is above de minimis, the ITA calculates individual company rates and compares them with the country-wide rate to determine if the there are "significant differentials" between them. A zero or de minimis rate is, by definition, a "significant differential" from a non-de minimis country-wide rate. Defendant's Memorandum, at 67-68. See 19 C.F.R. § 355.20(d) (1990).[1]

If any significant differentials exist, under this method the ITA no longer uses the country-wide rate for duty deposit or assessment purposes. Instead, company-specific rates are assigned to those companies receiving significantly different net subsidies (including zero rate and de minimis companies). The remaining companies form the basis of the "all other rate." The "all other" rate "is different from a countrywide rate because it is not based upon all companies, but, rather, those companies being reviewed whose rates are not significantly different from the country-wide rate." Defendant's Memorandum, at 68. In other words, for the group of companies whose individ-

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[1] Although the final determination was completed in 1988, the government's calculations were based at least in part upon policies later codified, with some changes, in regulations that became effective January 26, 1989. Countervailing Duties, Final Rule, 53 Fed. Reg. 52,306 (1988). In the administrative review, the ITA indicated that a significant difference between an individual rate and the country-wide rate is "10 percentage points or 25 percent whichever is greater." Ceramic Tile From Mexico, 53 Fed. Reg. 15090, 15,091. According the subsequent regulations, a "significant differential" is "a difference of the greater of at least five percentage points, or 25 percent. . . ." Countervailing Duties, Final Rule, 53 Fed. Reg. at 52,353 (19 C.F.R. § 353.20(d)(3).) The government relies extensively on the notice and comments from Countervailing Duties, Final Rule, in its memorandum.

ual rates are not significantly different from the country-wide rate, the ITA calculates a new "all other" rate that is different from the country-wide rate.

In Ipsco, the ITA established a country-wide countervailing duty for oil country tubular goods imported from Canada. Of eleven known producers and exporters, nine were found to receive zero or de minimis subsidies and were excluded from the countervailing duty determination. One did not respond to the ITA's questionnaire. Based upon Ipsco's verified responses to the questionnaire, Ipsco was found to have a non-de minimis net subsidy. Ipsco's rate was then used as the county-wide countervailing duty rate. Final Affirmative Countervailing Duty Determination; Oil Country Tubular Good From Canada, 51 Fed. Reg. 15,037 (1986); Ipsco, —— Fed. Cir. (T) at ——, 899 F.2d at 1193-94.

Ipsco challenged the determination, arguing that the proper method of calculating the country-wide rate was to avenue the net subsidy Ipsco received with the firms receiving no subsidies. Ipsco v. United States, 12 CIT 359, 360-61, 687 F. Supp. 614, 616 (1988). Ipsco contended that the resulting country-wide rate would be de minimis. Id. at 617. The Court of International Trade upheld the ITA's method. Id.

The Court of Appeals for the Federal Circuit reversed. Ipsco, —— Fed Cir. ——, 899 F.2d at 1197. The Court noted that S.C. § 1672e(a)(2) (1988) establishes a presumption in favor of country-wide countervailing duty rates, and held that "it was inconsistent with the concept of a country-wide rate for the ITA to disregard those companies receiving no benefit or a de minimis benefit when it determined the amount of the net subsidy and whether it was more than de minimis. Id. The Court of Appeals found no evidence that the Canadian government had subsidized the industry within the meaning of 19 U.S.C. § 1671(a) (1988), but only that it had attempted to aid a single firm.

> Where the overall level of subsidization provided to a particular industry by a foreign government is de minimis, no countervailing duty should be assessed. And, if there is a non-de minimis subsidy being Provided, the countervailing duty showed not exceed the weighted average benefit received by all firms that produce or export the subject goods, including those firms that receive little or no subsidy.

Ipso, —— Fed. Cir. (T) at ——, 899 F.2d at 1197.

The government argues that Ipsco requires only that the country-wide rate, calculated by including companies receiving zero or de minimis subsidies, be greater than de minimis before a countervailing duty may be unposed. Defendant's Memorandum, at 69 et seq. Since the country-wide rate was greater than de minimis in this case, the countervailing duty imposed upon Ceramica is consistent with Ipsco. Id. According to this argument the Ipsco decision simply does not concern the "all other" rate applied in this case and is therefore inapposite. Id. at 71.

The government's position is untenable unless the statement that "if there is a non-de minimis subsidy being provided, the countervailing duty should not exceed the weighted-average benefit received by all firms," is dictum. Ipsco, —— Fed. Cir. (T) at ——, 899 F.2d at 1197. It is not.

Notwithstanding the statement that there was no evidence of a government subsidy to the industry, the Ipsco court remanded the case for "the ITA to calculate a weighted-average net subsidy by dividing the sum of all the benefits provided in subsidy of the subject goods by the total value of export sales of the goods to the United States. If this net subsidy is de minimis, the countervailing duty should be negative." Ipsco, —— Fed. Cir. (T) at ——, 899 F.2d at 1197 (emphasis added).[2]

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[2] See also Ipsco, Inc. v. United States, 12 CIT 359, 361, 687 F. Supp. 614, 617 (1988), wherein the Court stated, "At most [the

This remand instruction clearly allows for the possibility (however unlikely) that the country-wide rate, so calculated, would not be de minimis. In that event the Ipsco Courts statement that the countervailing duty should not exceed the weighted average benefit received by all inns would have forbidden the application of the "all other" rate to Ipsco."

Although the government labors to distinguish the "all other" rate from the country-wide rate discussed in Ipsco, the administrative review makes no such distinction, and in fact refers to the rate for Ceramica and all other firms as a "country-wide rate." Ceramic Tile From Mexico, 53 Fed. Reg. at 15,090, 15,091. Like the country-wide rate in Ipsco, the "all other" rate applies to all imports of the ceramic tile in question except for those of companies with individual rates or specifically excluded from the order. Id at 15,090. Assuming, arguendo, that on remand in Ipsco the ITA had determined that the country-wide rate was not de minimis, the "all other" rate calculation would have been identical with the calculation that the Ipsco Court rejected.

Regulations cited by the government also support the position that the "all other" rate is simply another way of calculating the country-wide rate that "presumptively applies to all merchandise of such kind or class exported from the country investigated." 19 U.S.C. § 1671e(a)(2)(1988), Ipsco, —— Fed. Cir. (T) at ——, 899 F.2d at 1197. The regulations were adopted shortly after the final results in this case were published. Countervailing Duties, Final Rule, 53 Fed. Reg. 52,306 (1988). The government asserts that the regulations incorporate prior administrative practice. Defendant's Memorandum, at 67. Although the method of calculating the "all other" rate is described in detail in the governments response to comments to 19

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inclusion of the de minimis companies] could trigger a technical threshold that, under certain circumstances, would allow the ITA to disregard the overall effect of the programs as insignificant." (emphasis added.)

C.F.R. § 353.20(d), Countervailing Duties, Final Rule, 53 Fed. Reg. at 52,326, the regulations themselves make no reference to the "all other" rate or an equivalent calculation. Id at 52,344 et seq. (19 C.F.R. § 355).

Under the regulations, the final results of an administrative review must state the net subsidy on a country-wide basis. 19 C.F.R. § 355.22(c)(7) (1989). Thereafter, assessment and deposit of countervailing duties is to be at the country-wide rate, unless individual rates are stated for those producers that received significantly different net subsidies, or for those producers who requested individual reviews. 19 C.F.R. § 355.22(c)(10), (d), (f); Countervailing Duties, Final Rule, 53 Fed. Reg. 52,306, 52,354-55. The "all other" rate cannot be fairly characterized as an individual rate; it must therefore be an alternative method of calculating the country-wide rate. Since the concept of a country-wide rate requires that companies receiving no benefit or de minimis benefit be included in the calculation of net subsidy, the "all other" conflicts with Ipsco. Ipsco, — Fed. Cir. (T) at —, 899 F.2d at 1197.

The government argues that including companies with zero and de minimis rates in the calculation would result in a diluted rate far below the average rate of benefits received by the remaining companies. Defendant's Memorandum, at 73. This assertion cannot be reconciled with the determination that the rate of subsidy for these companies is not significantly different from the country-wide rate. The difference between the "all other" rate and the country-wide rate cannot be more than the smallest "significant differential" which was set by ITA practice in this case and is now established by regulation. 19 C.F.R. § 355.20(d)(3).

The ITA is authorized to establish differing countervailing duties if it determines that there is a significant differential between companies receiving subsidy benefits. 19 U.S.C. § 1671e(a)(2)(A); Ipsco, —— Fed. Cir. (T)

at ——, 899 F.2d at 1197. However, it is anomalous for the ITA to first determine that there is no significant differential between the net subsidy rates for "all other" companies and the country-wide rate, and then assess countervailing duties at a rate different from the country-wide rate.

The Court concludes that the calculation of the "all other" rate in the administrative review was not in accordance with law.

Retroactive Application

The government argues that in any event Ipsco should not be applied retroactively. In James B. Beam Distilling Company v. Georgia, —— U.S. ——, ——, 111 S.Ct. 2439, 2446, 115 L. Ed. 2d 481, 491 (1991), the Supreme Court held that "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." Because the rule announced in Ipsco respecting non-de minimis country-wide rates was applicable to the parties therein on remand, Beam requires that it be applied to this case.

Conclusion

Plaintiffs' count one is dismissed for failure to exhaust administrative remedies. The case is remanded to the ITA to recalculate the countervailing duty rate for Ceramics, Industries Intercontinental, and all other fans without specified individual rates, based on a weighted average of all companies investigated, including those whose individual rates are de minimis or zero or otherwise significantly different from the resulting country-wide rate.

R. Kenton Musgrave, Judge

Dated: May 15, 1992

New York, New York

JUDGMENT

This case having been duly submitted for decision, and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED: that Count One of plaintiffs complaint is dismissed for failure to exhaust administrative remedies; and it is further

ORDERED, ADJUDGED, and DECREED: The case is remanded to the ITA to recalculate the countervailing duty rate for Ceramica Regiomontana, S.A., Industries Intercontinental, S.A., and all other firms without specified individual rates, based on a weighted average of all companies investigated, including those whose individual rates are de minimis or zero or otherwise significantly different from the resulting country-wide rate.

R. Kenton Musgrave, Judge

Dated: May 15, 1992

New York, New York

APPENDIX G

No. 79-1365

[Mar 5, 1980]

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1979

DEPARTMENT OF ENERGY and CHARLES W. DUNCAN, JR.,
SECRETARY OF ENERGY,
Petitioners

v.

MOBIL OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attroney General

WILLIAM ALSUP
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

THOMAS P. HUMPHREY
SANDRA K. WIES
GRACE KIELMAN
Attorneys
Department of Energy
Washington, D.C. 20461

* * * *

[26] (and Mobil did so) on whether the product cost-allocation formula should be changed. 39 Fed. Reg. 32725-32727 (1974). Thereafter, the entire product cost-allocation formula was repromulgated and was comprehensively revised, although that part of the denominator including the volume of sales of exempt products was not changed (see page 10, *supra*). This rule, as well as the numerous other repromulgations of the cost-allocation formula (see note 6, *supra*), unquestionably would have been valid upon final publication if the April 30 amendment had never been made. *Batterton v. Francis*, 432 U.S. 416, 425 (1977). Hence, the court of appeals' conclusion that any defect in the April 30 amendment remained fatal through at least February 1, 1976, is wholly insupportable.

2. The court of appeals' decision imposes a severe burden on federal regulation of the prices of petroleum products and exacts a severe penalty from American consumers of those products. The immediate result of the decision is to increase substantially the maximum lawful selling price of all regulated products from April 30, 1974, through at least February 1, 1976.[26] Refiners have already begun to recalculate their maximum lawful [27]

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[26] In our view the decision below does not directly question the validity of the agency's regulations issued after February 1, 1976, which prohibit, as did the April 30 amendment, any inclusion in the prices of covered products of costs attributable to exempt products (See App. C, *infra*, 37a ———). Petroleum refiners, however, have construed the decision as holding that increased costs attributable to exempt products may be assigned to covered products from April 30, 19— to date (as long as certain products receive no more than volumetric apportionment in accordance with 15 U.S.C. 753 (b)(2)(D)). Moreover, some refiners have already filed claims for credits with the agency without offsetting these recalculated credits by the amounts of increased costs already received in the sales of exempt products. If the court of appeals' decision is not overturned and the refiners' interpretation of that decision ultimately prevails, the total increase in all prices may exceed $50 billion.

selling prices of regulated products for that period to include crude oil costs previously not attributed to regulated products.[27]

This recalculation, if allowed to occur, will have two significant impacts on the ongoing enforcement of federal pricing regulations. First, under 10 C.F.R. 212.83 (e), refiners may carry over or "bank" any portion of their lawful selling prices not recovered in a given period and may use such "banked" credits to increase prices in any later period. The agency estimates that refiners will claim a minimum of $17 to $18 million in additional credits for the period April 30, 1974, through February 1, 1976, based solely on the decision below. Refiners may attempt to recover these vast sums in imminent price increases (over and above otherwise lawful price increases) in the only remaining covered product eligible to absorb accrued costs—motor gasoline.[28] Because decontrol of * * *

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[27] The recalculation is based on the differences in the cost allocation formula illustrated in Appendix G, *infra*, 44a-44—.

[28] As indicated above (see page 11, note 6, *supra*), since the adoption of the April 30, 1974, amendment, all petroleum products except gasoline and propane have been deregulated. Because propane is one of the products specified by Congress to receive no more than a proportionate share, by volume, of increased crude oil costs (15 U.S.C. ————), gasoline * * *

APPENDIX H

THE WHITE HOUSE

Office of the Press Secretary

(St. Louis, Missouri)

For Immediate Release October 30, 1992

STATEMENT BY THE PRESIDENT

Today I am signing into law S. 1569, the "Federal Courts Administration Act of 1992." I am pleased that the bill explicitly authorizes an American national to file suit in the United States for the recovery of treble damages against the perpetrators of international terrorism. This will ensure that, if needed, a remedy will be available for Americans injured abroad by senseless acts of terrorism.

My approval of this bill also enacts a number of recommendations made by the Federal Courts Study Committee and contains a number of other important provisions for the judicial branch and its personnel. In addition, the bill makes certain important amendments to the Contract Disputes Act—amendments that will serve to provide a more efficient and fair resolution of contract disputes for many of those who do business with the Federal Government.

S. 1569 abolishes the Temporary Emergency Court of Appeals (TECA), which was established in 1970 to rule on appeals of certain oil price control cases. TECA's appellate jurisdiction will be transferred to the U.S. Court of Appeals for the Federal Circuit. I hope and expect that the Federal Circuit will adopt TECA precedent, just as the Federal Circuit earlier adopted Court of Claims precedent when its appellate jurisdiction was

transferred to the Federal Circuit. Adoption of TECA precedent would reduce any uncertainty prompted by the change of appellate jurisdiction, reducing delay in resolution of these matters and assisting the Department of Energy's efforts to bring these petroleum cases to a proper conclusion.

Although I have signed S. 1569, I will also withhold my approval of H.R. 6185. While both bills contain many of the same provisions, the amendments to the Contract Disputes Act contained in S. 1569 will better serve the public interest of improving the resolution of contract claim disputes between the Federal Government and its contractors.

GEORGE BUSH

THE WHITE HOUSE
October 29, 1992.